No. 00-46-CFX Title: Bruce G. Murphy, Petitioner
v.
Jeffrey H. Beck, Successor Agent for Southeast Bank, N. A.

Docketed:
July 7, 2000 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jul 5 2000	Petition for writ of certiorari filed. (Response due September 1, 2000)
	Jul 27 2000	Order extending time to file response to petition until September 1, 2000.
	Aug 24 2000	Brief of respondent Jeffrey H. Beck in opposition filed.
	Sep 6 2000	DISTRIBUTED for Conference of September 25, 2000
	Sep 6 2000	Reply brief of petitioner Bruce G. Murphy filed.
	Sep 26 2000	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT January 17, 2001. **********
	Nov 13 2000	Joint appendix filed.
	Nov 13 2000	Brief of petitioner Bruce G. Murphy filed.
	Dec 4 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 8 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Dec 8 2000	CIRCULATED.
	Dec 11 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 13 2000	Brief amici curiae of United States and Federal Deposit Insurance Corporation filed.
	Dec 13 2000	Brief of respondent Jeffrey H. Beck filed.
	Dec 29 2000	Reply brief of petitioner Bruce G. Murphy filed.
	Jan 5 2001	Record filed.
	Jan 8 2001	Record filed.
	Jan 12 2001	DISMISSED under Rule 46. **********

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No. 99-____

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal common-law *D'Oench, Duhme* doctrine, created and expanded by *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447 (1942), and its progeny, generally provides federal banking insurers, receivers, and their successors-in-interest added protections against unrecorded agreements that might form the basis of a claim or defense relating to federally insured banks that have come under the control of federal agents. There is a broad and well-recognized circuit split over whether this federal common-law doctrine is viable in light of this Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213 (1997).

The question presented in this case is:

Whether the federal common-law *D'Oench, Duhme* doctrine constitutes a valid bar to petitioner's claims?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff-appellant below, and petitioner in this court, is Bruce G. Murphy.

The defendant-appellee in the Southern District of Florida and in the Eleventh Circuit, and respondent in this Court, is Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A.

In the District Court for the District of Columbia, the D.C. Circuit, and the Southern District of Florida prior to the substitution of Beck, the defendant-appellee was the Federal Deposit Insurance Corporation ("FDIC"), as receiver for Southeast Bank, N.A. The FDIC is no longer a party to this case and is not a respondent in this Court.

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IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Bruce G. Murphy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

This case began in the District Court for the District of Columbia. It was appealed to the D.C. Circuit, remanded to the district court, transferred to the Southern District of Florida, and eventually appealed to the Eleventh Circuit. This Petition seeks review of the decision of the Eleventh Circuit.

The District Court for the District of Columbia's opinion and order granting summary judgment to then-defendant FDIC is published as *Murphy* v. *FDIC*, 829 F. Supp. 3 (D.D.C. 1993), and is reproduced as Appendix B (pages B1-

B11). The D.C. Circuit's decision reversing the district court is published as *Murphy* v. *FDIC*, 61 F.3d 34 (CADC 1995) ("*Murphy I*"), and is reproduced as Appendix C (pages C1-C14). On remand, the D.C. District Court transferred the case to the Southern District of Florida. The transfer order is unpublished and is reproduced as Appendix D (pages D1-D2). In May of 1998, Respondent Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A. ("Southeast Bank") was substituted as party defendant for the FDIC as receiver for Southeast Bank, N.A. The substitution order is unpublished and is reproduced as Appendix E (page E1). The District Court for the Southern District of Florida's opinion and order dismissing the complaint is unpublished and is reproduced as Appendix F (pages F1-F6). The Eleventh Circuit's decision affirming the district court is published as *Murphy* v. *FDIC,* 208 F.3d 959 (CA11 2000) ("*Murphy II*"), and is reproduced as Appendix A (pages A1-A18).

JURISDICTION

The Eleventh Circuit entered its judgment on April 7, 2000. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal common-law *D'Oench, Duhme* doctrine has been partially codified by 12 U.S.C. § 1823(e), as amended, and 12 U.S.C. § 1821(d)(9).[1] These provisions are reproduced as Appendix G (pages G1-G2) and Appendix H (page H1), respectively.

[1] Section 1823(e) was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989).

STATEMENT OF THE CASE[2]

On August 18, 1989, petitioner Murphy invested over $500,000 in Orchard Island Associates Limited Partnership ("Orchard") as part of a development project for a golf and beach club in Florida. Over a period of several years extending before and after this investment, Southeast Bank lent Orchard approximately $50 million for the project. Throughout this period Southeast Bank exercised extensive control and direction over the project making Southeast Bank a *de facto* joint venturer with Orchard. As a result of various wrongful activities by Southeast Bank and Orchard, Orchard eventually defaulted on its loans and Southeast Bank foreclosed on the property. In 1991, Southeast Bank was declared insolvent and placed into FDIC receivership.

In 1992, Murphy filed suit in the District Court for the District of Columbia against the FDIC as receiver for Southeast Bank. The complaint alleged that Southeast Bank's actions as a joint venturer with Orchid caused the loss of Murphy's investment. The complaint set forth claims for breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations.

The FDIC moved to dismiss the complaint, arguing that Murphy's claims were barred by the federal common-law *D'Oench, Duhme* doctrine. The *D'Oench, Duhme* doctrine originally only barred defenses to collection actions based upon secret side-agreements that contradicted loan documents or similar bank records concerning bank assets. Over time, however, the doctrine has expanded into a bar against all manner of claims or defenses against the FDIC or its successors that are based upon facts or agreements not memorialized in a bank's official records. In this case, the FDIC, as re-

[2] Unless otherwise noted, the facts are taken from the Eleventh Circuit's opinion, attached as Appendix A, which are in turn taken from the allegations of petitioner's complaint, which must be accepted as true given the procedural posture of the case. App. A4.

ceiver for Southeast Bank, asserted that *D'Oench* barred all of Murphy's claims because liability depended upon the joint misdeeds of Southeast and Orchard, but there was no written agreement in the Bank's records memorializing their collusive wrongdoing as a formal "joint venture."

On August 10, 1993, the district court treated the FDIC's motion as one for summary judgment and granted summary judgment on all counts. App. B1. The district court ruled that Murphy "cannot recover against Southeast on any theory of an alleged unwritten joint venture agreement pursuant to *D'Oench*, 315 U.S. 447 ... and 12 U.S.C. § 1823(e)." App. B4; *see also* App. B8 ("To the extent that the Plaintiff attempts to rely on an unwritten agreement to prove these securities violations claims, they are again barred by *D'Oench*."). Murphy appealed.

On August 1, 1995, the D.C. Circuit, per Judge Ginsburg for himself, Chief Judge Edwards, and then-Judge Wald, reversed. App. C2. The court held that § 1823(e) did not bar Murphy's claims and that this Court's "decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 ... (1994), removes the federal common law *D'Oench* doctrine as a separate bar to such claims." App. C2. As part of a detailed analysis of this Court's *O'Melveny* decision, the D.C. Circuit quoted *O'Melveny*'s statement regarding the "'extensive framework of FIRREA'" that "'[t]o create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.'" App. C10.

The D.C. Circuit then applied the reasoning of *O'Melveny* to the federal common-law *D'Oench* doctrine thus:

> [A]lthough the opinion for the Court does not specifically mention *D'Oench*, it does expressly include one of the *D'Oench*-like statutory provisions (§ 1821(d)(9)) in the list of special federal statutory rules of decision from which it infers that "*[i]nclusio unius, exclusio alterius*." *O'Melveny & Myers*, 512 U.S. at --, 114 S.Ct. at 2054.

> In so doing the Supreme Court, we think, necessarily decided the *D'Oench* question. To translate: the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one.

App. C10-C11. After disposing of various objections by the FDIC, the D.C. Circuit concluded that "the need for a body of federal common law under the rubric of *D'Oench* has now 'disappeared' and that the district court erred in holding that Murphy's claims are barred under *D'Oench*." App. C13.

After remand, the district court transferred the case, *sua sponte* and over Murphy's objections, to the Southern District of Florida. App. D1-D2.

On May 11, 1998, Jeffrey H. Beck, as Successor Agent for Southeast Bank, was substituted for the FDIC as the party defendant in the Southern District of Florida. App. E1.

On July 27, 1998, the Southern District of Florida granted Beck's motion to dismiss. App. F6. The district court held, *inter alia*, that Murphy's claims were barred by the *D'Oench* doctrine. App. F5. Despite this issue having already been decided in Murphy's favor in the D.C. Circuit, the Southern District of Florida reasoned that because the Eleventh Circuit, in an intervening case, had specifically disagreed with the D.C. Circuit's decision in *Murphy I*, "the *D'Oench* doctrine is still valid in this circuit ... [and] prevents Murphy from stating a valid claim." App. F6. Murphy appealed.

On April 7, 2000, the Eleventh Circuit affirmed the district court's decision based exclusively on the *D'Oench* doctrine. App. A5.[3] The Eleventh Circuit initially rejected Murphy's arguments that the D.C. Circuit's earlier decision in the

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[3] The court expressly declined to reach two other grounds given by the district court for the dismissal. App. A18 n. 8. Those other grounds, while in petitioner's view frivolous, would remain available on remand.

case should control based on either choice-of-law or law-of-the-case principles. The court noted that

> [w]e have had occasion recently to disagree with the D.C. Circuit as to the continued viability of the *D'Oench, Duhme* doctrine. ... In both *Motorcity I* and *Motorcity II* [*Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317 (CA11 1996) (*en banc*), *vacated and remanded sub nom. Hess* v. *FDIC*, 519 U.S. 1087 (1997), *reinstated, Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (CA11 1997) (*en banc*), *cert. denied sub nom. Hess* v. *FDIC*, 523 U.S. 1093 (1998)], we expressly disagreed with the D.C. Circuit's rejection of the doctrine. *See* ... *Motorcity II*, 120 F.3d at 1141-44 (noting the circuit split between the D.C. and Eighth Circuits, which have held that the FIRREA displaced the *D'Oench, Duhme* doctrine, and the Fourth Circuit, which has held that it did not, and holding that the federal common law doctrine was not preempted by the FIRREA and remained good law in this Circuit).

App. A7-A8. Thus, notwithstanding that the issue had been fully litigated in the D.C. district and circuit courts over a period of several years, the Eleventh Circuit simply wiped the slate clean and looked to its own contrary precedent regarding the viability of the *D'Oench* doctrine.[4]

In light of that precedent, the Eleventh Circuit rejected Murphy's argument that the *D'Oench* doctrine was no longer good law in light of FIRREA and this Court's decisions in *O'Melveny* and *Atherton*:

[4] The Eleventh Circuit also rejected Murphy's argument that the *D'Oench, Duhme* doctrine was inapplicable where a receivership has generated a substantial profit ($150 million) and hence the only persons (inequitably) benefiting from application of the doctrine – and from Murphy's loss – were the Bank's shareholders. App. A13-A14.

> In *Motorcity I* and *Motorcity II* we ruled decisively and *en banc* that the Supreme Court's decisions in *O'Melveny* and *Atherton* did not abrogate our prior holdings regarding the continued viability of the *D'Oench, Duhme* doctrine. We explained that both *O'Melveny* and *Atherton* dealt with the question of whether to create new federal common law in particular areas rather than with the question of whether Congress intended the FIRREA to supplant "the previously established and long-standing federal common law *D'Oench* doctrine." *Motorcity II*, 120 F.3d at 1143; *see also Motorcity I*, 83 F.3d at 1330. In *Motorcity II*, our affirmation of the *D'Oench, Duhme* doctrine in light of the FIRREA and the Supreme Court's decisions in *O'Melveny* and *Atherton* was explicit ... [quoting *Motorcity II*, 120 F.3d at 1144].

App. A16-A17. The court concluded that "the *D'Oench, Duhme* doctrine remains good law in this Circuit, and there is no sound reason not to apply the doctrine in this case. Accordingly, we affirm the district court's order dismissing Murphy's complaint." App. A18 (footnote omitted).

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Eleventh Circuit's decision conflicts with the decision of the D.C. Circuit in this very same case, as well as with decisions of the Third, Eighth, and Ninth Circuits. The decision also conflicts with this Court's decisions in *O'Melveny & Myers* v. *FDIC* and *Atherton* v. *FDIC*. The question presented raises an important national issue affecting myriad persons and entities that do business with financial institutions eventually placed under the control of federal conservators or receivers. The divergent results reached by federal courts – both between and within cases – runs retrograde to the goal of uniform federal law and undermines the fair administration of justice.

I. THIS CASE PRESENTS A CONFLICT AMONG SIX CIRCUITS OVER THE VITALITY OF THE *D'OENCH, DUHME* DOCTRINE.

This case presents the cleanest circuit split imaginable: The decision of the Eleventh Circuit regarding the continued availability of the *D'Oench, Duhme* doctrine contradicts, and expressly rejects, the decision of the D.C. Circuit on the precise same issue in an earlier stage of this very case. *Compare* App. A12 ("We have explicitly rejected, in both *Motorcity I* and *Motorcity II*, the D.C. Circuit's prior ruling regarding the preemption of the *D'Oench, Duhme* doctrine.") *with* App. C13 ("the district court erred in holding that Murphy's claims are barred under *D'Oench*").

Several other circuits also are divided on this issue. Siding with the D.C. Circuit are the Third, Eighth, and Ninth Circuits. *See FDIC* v. *Deglau*, 207 F.3d 153, 171 (CA3 2000) ("We agree with the Eighth, Ninth and D.C. Circuits that *D'Oench* is not applicable federal common law in light of *O'Melveny* and *Atherton*."); *DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First Nat'l Bank of Kansas City*, 69 F.3d 1398, 1402 (CA8 1995) (following *Murphy I*'s reasoning and holding that the *D'Oench* doctrine has been preempted); *Ledo Fin. Corp.* v. *Summers*, 122 F.3d 825, 828-29 (CA9 1997) (holding, in light of *O'Melveny* and *Atherton*, that *D'Oench* no longer applies, at a minimum, to the FDIC-as-receiver); *see also Kessler* v. *National Enters., Inc.*, 165 F.3d 596, 598 (CA8 1999) (post-*Atherton* rejection of *D'Oench*, citing *Divall*); *cf. FDIC* v. *Houde*, 90 F.3d 600, 605 n. 5 (CA1 1996) ("A circuit split has arisen as to whether the [*D'Oench*] doctrine is still valid after *O'Melveny & Myers*, *supra*. *Compare* [*DiVall* and *Murphy I* with *Motorcity I* (CA11)]. This court has not yet expressed an opinion as to the effect of *O'Melveny & Myers* on the doctrine.").

Siding with the Eleventh Circuit in favor of a continuing *D'Oench* doctrine is the Fourth Circuit. *Young* v. *FDIC*, 103 F.3d 1180, 1187 (CA4) ("Section 1823(e) does not, however, preempt the *D'Oench* doctrine." (citing *Motorcity I*)), *cert. denied*, 522 U.S. 928 (1997); *see also National Enters., Inc.* v. *Barnes*, 201 F.3d 331, 333 & n. 4 (CA4 2000) (post-*Atherton* confirmation of *D'Oench*, citing *Young*).

This broad split has persisted for years, both sides have recognized the conflict, the Eleventh Circuit has held fast even after a GVR by this Court, and there is no credible possibility that the split will resolve absent the direct intervention of this Court. Certiorari should therefore be granted.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *O'MELVENY* AND *ATHERTON*.

In addition to conflicting with the decisions of four other circuits, the Eleventh Circuit's decision conflicts with the decisions of this Court. In *O'Melveny & Myers*, this Court unanimously rejected the FDIC's attempt to rely upon federal common law to bar an affirmative defense to a negligence and breach-of-fiduciary-duty suit it brought as receiver for a failed bank. 512 U.S. at 83. This Court held that not only was there no general federal common law, but also that "those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver," including, specifically and notably, § 1821(d)(9), "demolished" the argument that FIRREA demonstrated a "high federal interest" sufficient to justify use of federal common law. 512 U.S. at 86. The rights expressly granted to the FDIC-as-receiver, this Court ruled, can be neither "supplemented [nor] modified by federal common law.... *Inclusio unius, exclusio alterius*." *Id.* Referring to the "extensive framework of FIRREA," this Court stated that "[t]o create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* at 87. While not addressing *D'Oench* by name, the use of § 1821(d)(9) as the basis for its application of the "*inclusio unius, exclusio*

alterius" principle more than covers that ground.[5] The decision in *O'Melveny*, fairly read, thus requires a contrary decision to that reached by the Eleventh Circuit in this case.

Two years after *O'Melveny*, this Court decided *Atherton*, which confirms that the federal common-law *D'Oench* doctrine is not viable. In *Atherton*, this Court held that only federal statutory requirements and compatible state law set the standard of care for officers and directors of a federally chartered savings association in a suit by federal receivers. 519 U.S. at 216. Among the many points of interest in *Atherton*, the Court held that even if there were no federal statute directly addressing the issue, federal common law did not provide the standard of care. *Id.* at 217-18. In disposing of various arguments proffered by the FDIC in favor of a federal common-law rule, the Court also noted the limited federal interest at stake when "the FDIC is acting only as receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer." *Id.* at 225. Finally, and of particular importance given the Eleventh Circuit's claim that *O'Melveny* and *Atherton* only apply to the creation of "new" federal common law rather than to the existence of "old" federal common law, App. A16-17, the Court in *Atherton* characterized the rule it rejected as being "a pre-existing judge-made federal common-law standard." *Id.* Indeed, the Court recognized that federal courts had been applying and interpreting the asserted federal common-law standard for over 100 years, *id.* at 220, yet did not hesitate in repudiating the validity of that standard.[6]

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[5] And, as the D.C. Circuit has noted in *Murphy I*, this "Court was specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the *D'Oench* doctrine." App. C10.

[6] Furthermore, while *O'Melveny* itself may have been addressed to a "new" rule, the cases relied upon by *O'Melveny*, 512 U.S. at 85, addressed "old" rules also. Thus, in *Milwaukee* v. *Illinois*, this Court stated that "when Congress addresses a question *previously governed by a decision rested on federal common law* the need for such an unusual exercise of law-making by federal courts disappears.... [The Court's] commitment to the separation of powers is too fundamental to continue to rely on federal common law ... when Congress has addressed the problem." 451 U.S. 304, 314-15 (1981) (emphasis added).

Because the Eleventh Circuit's decision is at odds with *O'Melveny* and *Atherton*, this Court should grant certiorari in order to return the Eleventh Circuit to the correct legal path.

III. THE QUESTION PRESENTED BY THIS CASE HAS SUBSTANTIAL CONTINUING IMPORTANCE.

The *D'Oench*, *Duhme* doctrine is the subject of extensive litigation and continues to arise in a variety of contexts, as the circuit split itself indicates. Thus, from the date of the *O'Melveny* decision in 1994 through the present – a period graced with a healthy national banking system and relatively few bank failures – *D'Oench* has been cited in over 300 opinions, according to a search on Westlaw.[7] These cases will continue to arise and will continue to result in the inconsistent administration of justice due to the circuit split.

This Court has previously passed on the opportunity to resolve this circuit conflict, perhaps in the hope that the issue would resolve itself based upon *Atherton*, or perhaps in reliance upon the FDIC's claim that cases involving *D'Oench* were of limited continuing significance. *See* Br. for the FDIC in Opp. at 6-7, *Noel* v. *FDIC*, No. 99-655 (*cert. denied*, -- U.S. --, 120 S. Ct. 935 (2000)) (claiming that the FDIC will assert *D'Oench* only as to transactions preceding the August 9, 1989, enactment of FIRREA and that such transactions are of limited and declining importance); Br. for the FDIC in Opp. at 10, *Hess* v. *FDIC*, No. 97-1025 (*cert. denied*, 523

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[7] And while not every case involves a direct application of *D'Oench*, the vast majority do, and the others demonstrate the broad secondary effects of this federal common-law doctrine.

U.S. 1093 (1998)) (same).[8] But these past denials of certiorari do not undermine the basis for granting certiorari in this case because the issue has not resolved itself and because the FDIC's claim of limited significance was based upon false assumptions. Of particular importance, the FDIC failed to acknowledge that its policy regarding the assertion of the *D'Oench* doctrine cannot and does not bind the many successors to the FDIC, such as respondent in this case. Therefore, certiorari should be granted because the conflict among the circuits persists and remains of continuing importance. *Cf.* Br. of the United States, *Balar* v. *United States*, No. 98-1667, at 14 n. 3 (asserting that certiorari should be granted, despite recent denial of certiorari on same question, because the filing of a further petition demonstrated the continuing significance of the question presented) (*cert. granted* -- U.S. --, 120 S. Ct. 10 (1999)); Reply of Pet., *Central Green Co.* v. *United States*, No. 99-859, at 8-9 & n. 3 (same) (*cert. granted* -- U.S. --, 120 S. Ct. 1416 (2000)).

With all due respect to the FDIC's assertions regarding the limited importance of this issue, the circuit split over *D'Oench* remains significant as to both pre- and post-FIRREA facts. Indeed, in the over three years since the FDIC issued its Policy Statement claiming to forego the invocation of *D'Oench* as to post-FIRREA facts,[9] the issue still has arisen frequently and has continued to vex the courts.

First, the FDIC is not the only party that asserts *D'Oench* as a defense. Numerous private successors-in-interest to federal receivers continue to assert the doctrine without regard to

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[8] Although the FDIC is no longer a party to this case, we are serving a courtesy copy of this petition on the Solicitor General, and granting consent for him to file an *amicus* brief for the FDIC should he see fit.

[9] Policy Statement Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (1997).

whether the transactions pre-date or post-date FIRREA. This case is a perfect example. *See also, e.g.*, *Beal Bank, SSB* v. *Pittorino*, 177 F.3d 65, 67-68 (CA1 1999) (private successor-in-interest to FDIC-as-receiver asserting *D'Oench* as to post-FIRREA facts); *Bolduc* v. *Beal Bank, SSB*, 167 F.3d 667, 673 (CA1 1999) (private successor-in-interest to FDIC-as-receiver invoking *D'Oench* as to post-FIRREA facts); *National Enters., Inc.* v. *First Western Fin. Corp.*, 166 F.3d 348, 1998 WL 852526, *1-3 (CA10 1998) (unpub.) (table; text in Westlaw) (private successor-in-interest to RTC-as-receiver asserting *D'Oench* as to both pre- and post-FIRREA facts); *AAI Recoveries, Inc.* v. *Pijuan*, 13 F. Supp.2d 448, 450-51 (S.D.N.Y. 1998) (successor-in-interest to FDIC-as-receiver asserting *D'Oench* regarding post-FIRREA facts); *State Street Capital Corp.* v. *Gibson Tile, Inc.*, 1998 WL 907027 (N.D. Tex. 1998) (unpub.) (successor-in-interest to RTC-as-receiver asserting *D'Oench* as to post-FIRREA facts); *cf. Remington Invs., Inc.* v. *Berg Prod. Design, Inc.*, 172 F.3d 876, 1999 WL 132267, *1 (CA9 1999) (unpub.) (table; text in Westlaw) (lease guarantor asserting *D'Oench against* successor-in-interest to FDIC-as-receiver as to undated facts); *First Union Nat'l Bank of Fla.* v. *Hall*, 123 F.3d 1374, 1376 (CA11 1997) (private successor-in-interest to FDIC-as-receiver asserting *D'Oench* as to facts of unspecified date), *cert. dismissed*, 523 U.S. 1135 (1998); *Rankin* v. *Toberoff*, 1998 WL 370305, *5 (S.D.N.Y. 1998) (unpub.) (successor-in-interest to FDIC-corporate invoking *D'Oench* as to pre- and post-FIRREA facts). Such successors-in-interest to the FDIC – including purchasers of assets from the FDIC and successor agents such as the respondent in this case – will undoubtedly continue to assert *D'Oench* as long as it remains available, regardless of any internal FDIC policies.

Second, *both* the FDIC and various private parties regularly continue to invoke or to defend *D'Oench* as to pre-FIRREA facts. *See, e.g.*, *Deglau*, 207 F.3d at 159 n. 2, 171 (CA3 2000) (FDIC-as-receiver and/or private successor-in-

interest asserted *D'Oench* as to pre-FIRREA facts); *Barnes*, 201 F.3d at 332-33 (CA4 2000) (private successor-in-interest to RTC-as-conservator asserting *D'Oench* regarding pre-FIRREA facts); *FDIC* v. *Noel*, 177 F.3d 911, 917-18 (CA10 1999) (applying *D'Oench* to pre-1989 facts), *cert. denied*, -- U.S. --, 120 S. Ct. 935 (2000); *UMLIC-Nine Corp.* v. *Lipan Springs Dev. Corp.*, 168 F.3d 1173, 1179 (CA10) (private successor-in-interest to RTC-as-receiver invoking *D'Oench* as to pre-FIRREA facts), *cert. denied*, -- U.S. --, 120 S. Ct. 499 (1999); *Kessler*, 165 F.3d at 598 (CA8 1999) (private successor-in-interest to RTC-as-receiver invoking *D'Oench* as to pre-FIRREA agreements); *Young* v. *FDIC*, 103 F.3d at 1187-89 (CA4 1997) (FDIC asserting *D'Oench* as to pre-FIRREA facts); *FDIC* v. *Frates*, 44 F. Supp.2d 1176, 1220-21 (N.D. Okla. 1999) (FDIC asserting *D'Oench* as to pre-FIRREA facts); *OCI Mortg. Corp.* v. *Marchese*, 745 A.2d 819, 821-22 (Conn. App. Ct. 2000) (successor-in-interest to RTC-as-receiver asserting *D'Oench* as to pre-FIRREA facts); *Diversified Fin. Sys., Inc.* v. *Miner*, 713 N.E.2d 293, 299 (Ind. Ct. App. 1999) (successor in interest to FDIC-as-receiver invoking *D'Oench* and as to pre-FIRREA facts); *Coker* v. *Cramer Fin. Group, Inc.*, 992 S.W.2d 586, 590 (Tex. App.-Texarkana 1999) (successor-in-interest to FDIC-as-receiver invoking *D'Oench* as to pre-FIRREA facts); *RTC Mortg. Trust 1994-S2* v. *Shlens*, 72 Cal. Rptr.2d 581, 592 (Cal. Ct. App. 2d Dist.), *rev. denied* (1998) (successor-in-interest to RTC-as-receiver invoking *D'Oench* as to pre-FIRREA facts); *Booker* v. *Sarasota, Inc.*, 707 So.2d 886, 887-88 (Fla. Ct. App. 1st Dist. 1998) (successor-in-interest to RTC/FDIC-as-receiver invoking *D'Oench* as to facts of uncertain, but likely pre-FIRREA, date); *see also* Br. for the FDIC in Opp. at 8, *Hess* v. *FDIC*, No. 97-1025 (cert. denied, 523 U.S. 1093 (1998)) ("Agreements made before [the enactment of FIRREA] ... are subject to pre-FIRREA law, including the

federal common law then well established under *D'Oench*.").[10]

Third, the FDIC has never conceded that FIRREA displaces *D'Oench* even as to post-FIRREA agreements. Its Policy Statement supposedly eschewing *D'Oench* in such contexts is just that – a policy statement, not a regulation – and thus, for all practical purposes, is legally meaningless. And there is at least some reason to doubt that the FDIC abides by that policy in any consistent fashion. *See, e.g., In re Boone (Boone* v. *FDIC)*, 235 B.R. 828, 834-35 (D.S.C. Bankr. 1998) (FDIC apparently asserting *D'Oench* as defense regarding post-1989 facts).[11]

Because courts continue to address numerous assertions of the *D'Oench* doctrine as to both pre- and post-FIRREA

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[10] Contrary to the FDIC's earlier claims, such cases are quite numerous and will continue to arise for many years to come. Given the long statute of limitations – six years – and the government's habit of appointing successive federal receiverships, there are likely numerous cases involving pre-1989 facts that have yet to be brought, much less that have resulted in a decision. *Cf. UMLIC-Nine Corp.*, 168 F.3d at 1179 & n. 5 (CA10 1999) (1986 Note, 1988 default, 1988 Receivership and transfer of assets, 1991 receivership of transferee, creation of dummy institution, transfer of assets and appointment of conservator for transferee, 1992 appointment of receiver for transferee, 1995 transfer of Note to private party; statute of limitations on 1988 default thus runs at least to 1997 – six years after appointment of the penultimate receiver, and maybe longer).

[11] Casting further doubt on the significance of the FDIC's February 1997 Policy Statement is the fact that the FDIC apparently continues to assert defenses based on amended § 1823(e) in cases involving *pre*-FIRREA transactions. *See Deglau*, 207 F.3d at 159 n. 2, 170-71 (CA3 2000) (applying § 1823(e) in favor of FDIC-as-receiver and its eventual successor-in-interest in case involving pre-FIRREA facts); *Aurora Shores Homeowners Ass'n, Inc.* v. *FDIC*, 2 F. Supp.2d 975, 977-79 (N.D. Ohio 1998) (FDIC-as-receiver invoking § 1823(e) as to pre-1989 facts); *cf. Alaska Southern Partners* v. *Prosser*, 972 P.2d 161, 164-65 (Alaska 1999) (successor-in-interest to FDIC-as-receiver invoking § 1823(e) as to pre-FIRREA facts).

facts, the issue continues to be of national significance and in great need of this Court's attention.

IV. THE JUDGMENT BELOW RESULTS IN THE NON-UNIFORM APPLICATION OF FEDERAL LAW.

In addition to the pressing general need to resolve a continuing and expanding split, this case itself presents a compelling vehicle in which to address the question presented. As an initial matter, the fact that the same plaintiff, on identical facts, both won and then lost on appeal in two different federal courts on the same question of law in the same case highlights the confusion among the circuits and the need for a uniform law on this subject. It also highlights the danger of forum shopping – primarily to avoid those circuits in which the *D'Oench* doctrine has been rejected – and the danger that inconsistent results will occur due solely to choice of forum.

Second, the procedural conduct of this case clouds the credibility of the federal courts insofar as it appears that a successful plaintiff was deprived of his efforts by the manipulations of the government and the judiciary. Thus, without purporting to know the mind of the district judge, it certainly has a questionable appearance when a judge who has just been reversed transfers a case, *sua sponte*, to a circuit in which the law is more hospitable to his original opinion. This appearance is exacerbated by the fact that the transfer was for the purported reason of the convenience of the parties and witnesses and the better application of state law, but upon reaching the transferee circuit, the case was fully (and predictably) resolved based on controlling federal precedent on a motion to dismiss. The entire predicate for the transfer thus proved utterly hollow and the only consequence was that the transferee district's original views were effectively reinstated in a more favorable forum as a result of the transfer.

Third, the entire notion of having a transferee court apply its own law is predicated upon the supposed uniformity of

federal law. But such uniformity can come only from this Court in cases where the transferee and the transferor court themselves split on a dispositive question of law. In order to make any sense of this federal choice of law rule, this Court needs to impose the presumed uniformity in cases such as this one. Otherwise, the justifications offered by the Eleventh Circuit for applying its own law to the transferred case are just empty platitudes. The need for Supreme Court-imposed uniformity is even greater given the Eleventh Circuit's refusal to apply the law-of-the-case doctrine on the sole ground that it disagreed with its sister circuit and hence refused to defer to its ruling despite the parties already having fully litigated the issue between them.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: July 5, 2000.

APPENDICES

APPENDIX A

208 F.3d 959

Bruce G. MURPHY, Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Southeast Bank, N.A.; Jeffrey H. Beck, Defendants-Appellees.

No. 98-5292.

United States Court of Appeals,

Eleventh Circuit.

April 7, 2000.

John F. Bloss, Clark & Wharton, Greensboro, NC, for Plaintiff- Appellant.

Elliot H. Scherker, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BIRCH and MARCUS, Circuit Judges, and ALAIMO*, Senior District Judge.

MARCUS, Circuit Judge:

Plaintiff-Appellant Bruce G. Murphy ("Murphy") appeals the district court's order dismissing his amended complaint against Defendant Jeffrey Beck, as Successor Agent for the Federal Deposit Insurance Company, ("FDIC"). Among other things, the district court held that Murphy's claims

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* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

against the FDIC were barred by the federal common law *D'Oench, Duhme* doctrine first expounded by the Supreme Court in *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942). Because acceptance of the *D'Oench, Duhme* doctrine is well-settled in this Circuit, and because we can discern no sound reason for not applying the doctrine in this case, we affirm the district court's order dismissing Murphy's complaint.

I.

The facts underlying this case are straightforward, but the procedural history of the case is both unusual and important. In June 1989, Murphy received a letter from Robert H. Haines, III, a general partner in Orchid Island Associates Limited Partnership ("Orchid"), soliciting Murphy's investment in Orchid's development of the Orchid Island Golf and Beach Club Project (the "Project") located in Indian County, Florida. The letter projected a 6.1 multiple return on investments. Soon thereafter, on August 18, 1989, Murphy invested $515,672.37 in a limited partnership interest in Orchid.

Southeast Bank provided several loans for the Project from the fall of 1988 until the beginning of 1991. These loans totaled approximately $50 million. Orchid eventually defaulted on its loans and Southeast foreclosed on the property. Southeast itself was declared insolvent on September 19, 1991 and placed in FDIC receivership.

On August 20, 1992, Murphy filed suit in the United States District Court for the District of Columbia against the FDIC, as receiver for Southeast, alleging that Southeast asserted extensive control over the Project and that Southeast knew about and participated in the fraudulent activities of Orchid's principals. According to the complaint, Murphy was induced to invest by a solicitation letter from Orchid which falsely represented that projections by Arthur Anderson & Co. reflected a "6.1 multiple return on [ ][his] investment." Murphy claimed that Southeast acted in concert with Orchid

in making decisions pertaining to the Orchid development, and that these decisions were separate and apart from Southeast's role as a mere lender to Orchid. Murphy added that Southeast's actions as a joint venturer with Orchid in the Project caused the loss of his financial investment. Accordingly, Murphy sued for breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations.

The FDIC moved to dismiss the complaint on the grounds that Murphy's claims were barred by the federal common law doctrine of *D'Oench, Duhme*. On August 10, 1993, the district court, treating the FDIC's motion as a motion for summary judgment, granted summary judgment on all counts. The district court ruled that under the *D'Oench, Duhme* doctrine, Murphy could not assert a claim against the FDIC based on the theory that Southeast was a joint venturer with Orchid in the Project because there was no written joint venture agreement between the two. *Murphy* v. *FDIC*, 829 F. Supp. 3, 5-6 (D.D.C. 1993). In fact, the written agreements between the bank and Orchid denied such a relationship. *Id.* On appeal, the Court of Appeals for the D.C. Circuit reversed the district court's decision on all but two counts,[1] holding that the *D'Oench, Duhme* doctrine had been preempted by the Financial Institutions Reform, Recovery, and Enhancement Act

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[1] The Circuit Court affirmed the district court's grant of summary judgment in favor of the FDIC on Murphy's two procedural claims seeking 1) a declaratory judgment that the FDIC is required by statute to establish an ADR procedure, and 2) a writ of mandamus compelling that result. As for the first claim, the court held that although the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 (FIRREA) did not seem to require the FDIC to establish an ADR process, the FDIC appeared to have initiated such a program and therefore Murphy's request for the court to order the FDIC to do so was moot. As for the second claim, the court held that the FIRREA gave the FDIC discretion to decide whether to refer any particular case to ADR and therefore Murphy was not entitled to an order compelling the FDIC to direct his case to ADR. *Murphy*, 61 F.3d at 40-41.

of 1989 (FIRREA) and did not, therefore, bar Murphy's claims. *See Murphy* v. *FDIC*, 61 F.3d 34, 39 (D.C. Cir. 1995) (concluding that "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one").

After remand to the district court, the FDIC again moved to dismiss the complaint for failure to state a claim. Without ruling on the motion, the district court transferred the case to the Southern District of Florida, concluding that the Southern District of Florida was a more convenient location for the case because the Plaintiff and the majority of witnesses resided in the district and both the Project and Southeast Bank had been located there. The district court for the Southern District of Florida substituted Jeffrey H. Beck as successor agent for the FDIC and, thereafter, granted the FDIC's Motion to Dismiss. The district court offered three alternative grounds for its decision: first, loan agreements between Orchid and Southeast disclaiming the existence of a joint venture barred Murphy, as a limited partner in Orchid and therefore a party to the agreements, from asserting such a joint venture; second, even if Murphy were not a party to the agreements, he failed to prove the existence of a joint venture relationship between Orchid and Southeast; and finally, the federal common law *D'Oench, Duhme* doctrine barred Murphy's claim.

II.

We review a district court's order granting a motion to dismiss for failure to state a claim de novo. *Beck* v. *Deloitte & Touche*, 144 F.3d 732, 736 (11th Cir. 1998); *McKusick* v. *City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996). When considering a motion to dismiss for failure to state a claim, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiff. *Kirby* v. *Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999).

On appeal, we need only consider the district court's third reason for dismissal. Plainly, the *D'Oench, Duhme* doctrine was intended "to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets [and liabilities] in the portfolios of the banks which [the FDIC] insures." *D'Oench, Duhme*, 315 U.S. at 457, 62 S. Ct. at 679, 86 L. Ed. 956. The doctrine originated more than half-a-century ago in the case of *D'Oench, Duhme & Co., Inc.* v. *FDIC* where a securities dealer who executed a demand note with a bank tried to prevent the FDIC, which had acquired the note, from enforcing it because of the dealer's separate agreement with the bank that the note would not be called for payment. The Supreme Court rejected the defense and squarely held that a secret agreement not on the bank's records could not operate as a defense against the FDIC's suit. *Id.* at 459, 62 S. Ct. at 680.[2]

The Eleventh Circuit has described the scope of the

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[2] Eight years later, Congress partially codified the holding of *D'Oench, Duhme*, as section 2(13)(e) of the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e)(1). This provision, as modified by the Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101-73, currently provides:

> No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement–
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

D'Oench, Duhme doctrine in these terms:

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

Baumann v. *Savers Federal Sav. and Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir. 1991). *See also Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317, 1326 (11th Cir. 1996) (*en banc*), *vacated and remanded by Hess* v. *FDIC*, 519 U.S. 1087, 117 S. Ct. 760, 136 L.Ed.2d 708 (1997), *reinstated by Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (11th Cir. 1997), (*en banc*), *cert. denied*, *Hess* v. *FDIC*, 523 U.S. 1093, 118 S. Ct. 1559, 140 L.Ed.2d 791 (1998).[3] We have held that the doctrine "'applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records.'" *OPS Shopping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 308 (11th Cir. 1993) (quoting *Baumann*, 934 F.2d at 1510). We have also made clear that the doctrine applies when the FDIC is acting as a receiver. *See FSLIC* v. *Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1274, 1276-77 (11th Cir. 1989) (holding that the federal common law *D'Oench, Duhme* doctrine protects the FSLIC and the FDIC in both receiver and corporate capacities); *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991) (*per curiam*) (citing

[3] The Supreme Court granted certiorari on *Motorcity I*, vacated our judgment, and remanded the case for further consideration in light of its decision in *Atherton* v. *FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L.Ed.2d 656 (1997). In *Motorcity II*, after considering the Supreme Court's decision in *Atherton*, we reaffirmed our previous holding in *Motorcity I* and reinstated that opinion.

cases for the proposition that "courts have consistently applied the [*D'Oench, Duhme*] doctrine to those situations where the FDIC was acting in its capacity as receiver").

Because no written agreement exists between Southeast and Orchid, if the *D'Oench, Duhme* doctrine applies in this case, it bars Murphy's claims against the FDIC which are based on his allegations that Orchid and Southeast were acting as joint venturers. Murphy argues, however, that there are four independent reasons why the *D'Oench, Duhme* doctrine should not be applied in this case: first, the choice of law doctrine requires application of D.C. Circuit law rather than Eleventh Circuit law; second, the D.C. Circuit's decision that the *D'Oench, Duhme* doctrine has been preempted by the FIRREA should be accepted as law of the case; third, the doctrine should not be applied to cases in which the receivership has generated a surplus; and finally, the doctrine is no longer valid in light of recent Supreme Court rulings. We are not persuaded by any of these arguments and address each in turn.

A.

We have had occasion recently to disagree with the D.C. Circuit as to the continued viability of the *D'Oench, Duhme* doctrine. In its consideration of this case before transfer, the D.C. Circuit held that the doctrine had been preempted by the FIRREA, and therefore could not bar Murphy's claims. *Murphy* v. *FDIC*, 61 F.3d at 38. According to the D.C. Circuit, "the Supreme Court ... necessarily decided the *D'Oench* question.... [T]he inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one." *Id.* at 39. In both *Motorcity I* and *Motorcity II*, we expressly disagreed with the D.C. Circuit's rejection of the doctrine. *See Motorcity I*, 83 F.3d at 1327 (noting that "[i]n *Murphy* v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995), the D.C. Circuit recently held that the Supreme Court's reasoning in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114

S. Ct. 2048, 129 L. Ed.2d 67 (1994), leads 'ineluctably' to the conclusion that the common law *D'Oench* doctrine has been preempted. *Id.* at 38.... We disagree ... and hold that the federal common law *D'Oench* doctrine has not been preempted by statute" (internal citations omitted)); *Motorcity II*, 120 F.3d at 1141-44 (noting the circuit split between the D.C. and Eighth Circuits, which have held that the FIRREA displaced the *D'Oench, Duhme* doctrine, and the Fourth Circuit, which has held that it did not, and holding that the federal common law doctrine was not preempted by the FIRREA and remained good law in this Circuit). In *Motorcity II* we concluded that "the analysis set forth in our prior *en banc* opinion [*Motorcity I*] reflects the most reasonable reading of Congress's intent – *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine." *Id.* at 1144.

Murphy argues nevertheless that we should apply the law of the D.C. Circuit rather than our own law to his claims because the law of the transferor court should govern in the context of transfers pursuant to 28 U.S.C. § 1404(a). Although this circuit has not addressed the question of whether a transferee court should follow its own interpretation of federal law or that of the transferor court, several other circuits have addressed the question, and all have concluded that the transferee court should apply its own interpretation of federal law. We find the reasoning of these circuits persuasive.

In *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987), the D.C. Circuit addressed the question of what law to apply to a number of wrongful death actions that were transferred to the District of Columbia pursuant to 28 U.S.C. § 1407 for consolidated pretrial proceedings. The substantive issue before the court was whether the per-passenger damage limits set by the Warsaw Convention should be applied to limit Korean Air Lines' liability when the type size of the liability limit printed on the tickets

was smaller than the size required by the Montreal Agreement. The district court, interpreting District of Columbia law, held that the damage limits were applicable. *See In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985). This ruling was, however, contrary to precedent in the Second Circuit where several of the cases had originally been filed. *See In re Korean Air Lines Disaster*, 829 F.2d at 1172. The D.C. Circuit affirmed the district court's order squarely holding "that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit." *Id.* at 1173.

The court also distinguished *In re Korean Air Lines* from *Van Dusen* v. *Barrack*, 376 U.S. 612, 84 S. Ct. 805, 11 L.Ed.2d 945 (1964), in which the Supreme Court held that when a defendant in a diversity action moves for a transfer of venue under 28 U.S.C. 1404(a), the state law that would have applied in the transferor court adheres to the case. *See Van Dusen*, 376 U.S. at 637-39, 84 S. Ct. at 820. The D.C. Circuit explained that the logic behind *Van Dusen* – reflecting the need to ensure that federal and state courts uniformly apply the same state law to diversity cases regardless of where the cases are tried – does not apply to a case brought under federal law because federal law is supposed to be unitary. *In re Korean Air Lines*, 829 F.2d at 1175-76. As the Circuit Court explained:

> Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.

Id. at 1175-76. The court concluded that "[t]he federal courts ... owe respect to each other's efforts and should strive to

avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." *Id.* at 1176.

The Second, Eighth, and Ninth Circuits uniformly have agreed with the D.C. Circuit that in cases where federal law is at issue, transferee courts are obligated to follow their own interpretation of the relevant law. *See Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1171 n. 4 (8th Cir. 1998) (holding that the consolidated issues the court was hearing were controlled by the law of its circuit and not the law of the various circuits from which the cases were transferred); *Temporomandibular Joint (TMJ) Implant Recipients* v. *E.I. DuPont De Nemours & Co.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (holding that "[w]hen analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located"); *Newton* v. *Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (same); *Menowitz* v. *Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993) (same).[4]

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[4] The Seventh Circuit has also agreed, in *dicta*, in the factually dissimilar case of *Eckstein* v. *Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), with the reasoning of the D.C. Circuit. *Eckstein* involved a question of the appropriate statute of limitations for a claim of fraud arising under § 10(b) of the Securities Exchange Act of 1934. The case involved two sets of plaintiffs, both of whom filed their action before 1990. When the litigation began, federal courts throughout the country derived the periods of limitations in § 10(b) cases from state law. *See Eckstein*, 8 F.3d at 1124. However, in July 1990, the Seventh Circuit overruled its opinions that had looked to state law and held that § 13 of the Securities Act of 1933 supplied the proper statute of limitations for § 10(b) fraud claims. *See Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990). In June 1991, the Supreme Court agreed with the Seventh Circuit that the federal securities laws are the proper source of the period of limitations but selected § 9(e) of the Securities Exchange Act of 1934 as the most appropriate rule. *See Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n. 9, 111 S. Ct. 2773, 2782 n. 9, 115 L. Ed.2d 321 (1991). Congress responded to *Lampf* by enacting stopgap legislation

We find the reasoning of the D.C., Second, Eighth, and Ninth Circuits persuasive. Since the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit. Therefore, we conclude that the law of the Eleventh Circuit, rather than the law of the D.C. Circuit, regarding the continued viability of the *D'Oench, Duhme* doctrine, was properly applied in this case.

B.

Second, Murphy argues that even if the law of the Eleventh Circuit should, in general, be applied to cases transferred

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which provided that the proper period of limitations for cases filed on or before June 19, 1991, was the limitation period provided by the laws in the applicable jurisdiction as those law existed on June 19, 1991. *See Eckstein*, 8 F.3d at 1124 (quoting § 27A of the '34 Act, 15 U.S.C. § 78aa-1(a)). The district court in Eckstein held that under the stopgap legislation provided by § 27A, the law of the Seventh Circuit as stated in Short should control the statute of limitations imposed on both the plaintiffs who filed originally in the Seventh Circuit and those who filed originally in the Ninth Circuit. *See Majeski* v. *Balcor Entertainment Co. Ltd.*, 786 F. Supp. 1458, 1461 (E.D. Wis. 1992). On appeal, the Seventh Circuit faced the question of the proper application of § 27A to transferred cases. The Seventh Circuit agreed with the D.C. Circuit's reasoning in *In re Korean Air Lines* that a transferee court should normally use its own best judgment about the meaning of federal law when evaluating a federal question. According to the court, "A single federal law implies a national interpretation. Although courts of appeals cannot achieve this on their own, the norm is that each court of appeals considers the questions independently and reaches its own decision, without regard to the geographic location of the events giving rise to the litigation." *Eckstein*, 8 F.3d at 1126. The court concluded, however, that Congress' stopgap legislation required a different result in this case. The Seventh Circuit held that § 27A required them to apply the statute of limitations of the Seventh Circuit to the plaintiffs who filed originally in Wisconsin and the statute of limitations of the Ninth Circuit to the plaintiffs who filed originally in California as those laws existed on June 19, 1991. *Id.* at 1127-28. Unlike in *Eckstein*, there is no Congressional mandate in the present case instructing us to depart from the usual rule that a court of appeals must apply its own interpretation of federal law.

here, the previous holding of the D.C. Circuit in this case – that the *D'Oench, Duhme* doctrine has been preempted by the FIRREA – binds this Court as "law of the case." "[L]aw of the case is an amorphous concept." *Arizona* v. *California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). The doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Id*; *see also Robinson* v. *Parrish*, 720 F.2d 1548, 1549-50 (11th Cir. 1983). The purpose of the doctrine is to bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already decided. *See Wheeler* v. *City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984); *United States* v. *Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984); *Robinson*, 720 F.2d at 1550. The law of the case doctrine does not, however, require rigid adherence to rulings made at an earlier stage of a case in all circumstances. *See Robinson*, 720 F.2d at 1550. The doctrine "directs a court's discretion, it does not limit the tribunal's power." *Arizona*, 460 U.S. at 618, 103 S. Ct. 1382; *see also DeLong Equip. Co.* v. *Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir. 1993) (noting that the doctrine "'is not an inexorable command that rigidly binds the court to its former decisions, but rather is an expression of good sense and wise judicial practice'") (quoting *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974)). Both the Supreme Court and this Circuit have made clear that reconsideration of a prior holding is not improper if the court is convinced that the prior decision is clearly erroneous and would work manifest injustice. *See Arizona*, 460 U.S. at 619 n. 8, 103 S. Ct. at 1391 n. 8; *Wheeler*, 746 F.2d at 1440 (citing *United States* v. *Robinson*, 690 F.2d 869, 872 (11th Cir. 1982)). Such is the case here. We have explicitly rejected, in both *Motorcity I* and *Motorcity II*, the D.C. Circuit's prior ruling regarding the preemption of the *D'Oench, Duhme* doctrine. We are not, therefore, bound by the "law of the case" doctrine to adhere to a ruling with which we have emphatically and repeatedly disagreed.

C.

Third, Murphy argues that even under current Eleventh Circuit law the *D'Oench, Duhme* doctrine should not be applied in this particular case because, Southeast, unlike the vast majority of FDIC receiverships, generated a $150 million surplus. Murphy suggests that because, under 12 U.S.C. § 1821(d)(11)(B), the bank's shareholders are allowed to divide funds remaining in a receivership pool after the creditors have been paid in full, applying the *D'Oench, Duhme* doctrine in this case would unfairly allow Southeast's shareholders to benefit from Murphy's loss. Murphy contends that allowing the bank's shareholders to divide what remains of his lost investment is contrary to notions of equity.

Murphy can point us to no case law, however, saying or even suggesting that the *D'Oench, Duhme* doctrine does not apply in cases where the receivership has generated a surplus. Rather, Murphy cites cases favoring the use of corporate assets to discharge debts before corporate stockholders are paid. *See Bankers Trust Co.* v. *Florida East Coast Ry. Co.*, 31 F. Supp. 961, 964 (S.D. Fla. 1940) (ordering preferential payment by receivers of defendant railroad of previously entered judgment awarding plaintiff damages for the wrongful death of her husband); *Hoyt* v. *Hampe*, 206 Iowa 206, 214 N.W. 718, 719 (1927) (explaining that "[t]he stockholders of a corporation are not entitled to a distribution of the assets among themselves while corporate debts remain unpaid"). Neither of these cases involve the FDIC as a party, and they do not implicate or shed light on the applicability of the *D'Oench, Duhme* doctrine in cases of surplus.[5]

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[5] The third case Murphy cites in support of his surplus argument, *First Interstate Bank of Texas, N.A.* v. *First National Bank of Jefferson*, 928 F.2d 153 (5th Cir. 1991), also does not involve the *D'Oench, Duhme* doctrine and merely underscores the inapplicability of these cases to the question at hand. In *First Interstate Bank* the court expressly states that "[t]he *D'Oench, Duhme* doctrine protects the FDIC, not a solvent bank.

As we explained in *Motorcity I*, the purpose of the *D'Oench, Duhme* doctrine is to ensure that the FDIC can rely on the records of a failed bank to determine quickly whether to engage in a purchase and assumption transaction, or whether to liquidate the failed bank and pay off insured deposits. *Motorcity I*, 83 F.3d at 1324. "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Motorcity I*, 83 F.3d at 1325. Permitting the doctrine to be overridden if a receivership generates a surplus in the future undermines the doctrine's purpose of enabling the FDIC to make informed and accurate evaluations of a failed bank's assets and liabilities at the outset of the receivership in order to determine the best way to manage the bank's losses. Indeed the rationale of *D'Oench, Duhme* – to protect the FDIC from enforcement of oral agreements against failed financial institutions – is no less compelling if the failed institution eventually generates a surplus. The exception Murphy favors would eviscerate the doctrine. We conclude, therefore, that neither precedent nor the doctrine's purpose counsel in favor of creating an exception to the application of the *D'Oench, Duhme* doctrine for cases in which a receivership generates a surplus.

D.

Finally, Murphy argues that the *D'Oench, Duhme* doctrine is no longer good law because it has been supplanted by the FIRREA. Murphy argues that the Supreme Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L.Ed.2d 67 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed.2d 656 (1997), require such preemption. Our Circuit has already spoken clearly on this issue rejecting precisely this claim.

In *O'Melveny & Myers*, the FDIC, as receiver of a failed

The district court correctly declined to extend the doctrine to this case in which the FDIC is not a party." *Id.*, 928 F.2d at 156.

California savings and loan (S&L), brought a malpractice lawsuit against the savings and loan's former law firm, pleading causes of action under California law for professional negligence and breach of fiduciary duty. *Id.*, 512 U.S. at 82, 114 S. Ct. at 2052. The FDIC alleged that the law firm failed to inform the S&L of the illegal acts of the S&L's controlling officers. *Id.* The law firm defended by arguing that, under California law, knowledge of the conduct of the S&L's controlling officers must be imputed to the S&L, and hence to the FDIC, which, as receiver, stood in the S&L's shoes. Id. The FDIC urged the Court to create a new federal common law rule to govern the imputation of knowledge to the FDIC. *Id.* at 83, 114 S. Ct. at 2052. The Court declined to do so. First, the Court explained that, by statute, California, rather than federal common law, governed imputation of corporate officers' knowledge to the FDIC. The Supreme Court noted that 12 U.S.C. § 1821(d)(2)(A)(i), as amended by the FIRREA, "places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law except where some provision in the extensive framework of FIRREA provides otherwise." *Id.*, at 87, 114 S. Ct. at 2054. Moreover, the Court explained that even if the FIRREA was not applicable in the present case this was not a case "in which judicial creation of a special federal rule would be justified." *Id.* at 87, 114 S. Ct. at 2055.[6]

In *Atherton*, the Resolution Trust Corporation (later replaced by the FDIC) sued several officers and directors of the failed City Federal Savings Bank claiming that they had violated the legal standard of care they owed that federally insured institution. *Id.*, 519 U.S. at 215, 117 S. Ct. at 668. The

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[6] The Court explained that the creation of federal common law was justified only in those limited situations where "there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny*, 512 U.S. at 87, 114 S. Ct. at 2054 (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 1304, 16 L.Ed.2d 369 (1966)).

Supreme Court addressed the question of where courts should look to find the standard of care against which to measure the legal propriety of the defendants' conduct – to state law, to federal common law, or to a provision of the FIRREA, 12 U.S.C. § 1821(k). *Id.* at 215-216, 117 S. Ct. at 669. The district court had held that the federal statute, § 1821, provided the appropriate standard of care. *Id.* at 216, 117 S.Ct. at 669. The Court of Appeals for the Third Circuit reversed holding that the federal statute provided only a baseline level of care but did not prohibit actions resting upon stricter rules originating in either state law or in federal common law. *Id.* at 217, 117 S. Ct. at 669. The Supreme Court vacated the Third Circuit opinion. As an initial matter the Court held that the federal common law corporate governance standards articulated by the Court in *Briggs* v. *Spaulding*, 141 U.S. 132, 11 S. Ct. 924, 35 L. Ed. 662 (1891), did not survive the Court's later decision in *Erie R. Co.* v. *Tompkins*. *Id.*, at 226, 117 S. Ct. at 674. As a result, the Court made clear: "There is no federal common law that would create a general standard of care applicable to this case." *Id.* The Court then went on to consider whether federal statute, 12 U.S.C. § 1821, or state law provided the appropriate standard of care in the case. The Supreme Court held that the federal statute's "gross negligence" standard provided a floor, but did not stand in the way of a stricter state-law standard making directors and officers liable for less egregious conduct. *Id.* at 227, 117 S. Ct. at 674.

In *Motorcity I* and *Motorcity II* we ruled decisively and en banc that the Supreme Court's decisions in *O'Melveny* and *Atherton* did not abrogate our prior holdings regarding the continued viability of the *D'Oench, Duhme* doctrine. We explained that both *O'Melveny* and *Atherton* dealt with the question of whether to create new federal common law in particular areas rather than with the question of whether Congress intended the FIRREA to supplant "the previously established and long-standing federal common law *D'Oench* doc-

trine." *Motorcity II*, 120 F.3d at 1143; *see also Motorcity I*, 83 F.3d at 1330. In *Motorcity II*, our affirmation of the D'Oench, Duhme doctrine in light of the FIRREA and the Supreme Court's decisions in *O'Melveny* and *Atherton* was explicit:

> [W]e decline to accept *Motorcity's* invitation to overrule *D'Oench*. With the *D'Oench* doctrine safely in place as a long-standing federal common law rule, we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States* v. *Texas*,[7] and not that articulated in *Atherton* and *O'Melveny*. We continue to believe that the analysis set forth in our prior en banc opinion reflects the most reasonable reading of Congress's intent – *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.

Id., 120 F.3d 1140, 1144. This panel is bound by the Circuit's prior *en banc* decision. *See Chambers* v. *Thompson*, 150 F.3d 1324, 1326 (11th Cir.1998) (noting that "[w]e are bound to follow a prior panel or *en banc* holding, except where that holding has been overruled or undermined to the

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[7] In *United States* v. *Texas*, 507 U.S. 529, 113 S. Ct. 1631, 123 L. Ed.2d 245 (1993), the Supreme Court noted the "longstanding ... principle that '[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* 507 U.S. at 534, 113 S. Ct. 1631 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294 (1952)). The Court held that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (citing *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 2015, 56 L. Ed.2d 581 (1978); *Milwaukee* v. *Illinois*, 451 U.S. 304, 315, 101 S. Ct. 1784, 1791, 68 L. Ed.2d 114 (1981)).

point of abrogation by a subsequent *en banc* or Supreme Court decision").

Therefore, under the *D'Oench, Duhme* doctrine, Murphy has failed to state a claim against the FDIC because he has not alleged a written agreement between Southeast and Orchid establishing their joint venture relationship, the *D'Oench, Duhme* doctrine remains good law in this Circuit, and there is no sound reason not to apply the doctrine in this case. Accordingly, we affirm the district court's order dismissing Murphy's complaint.[8]

AFFIRMED.

[8] In view of this ruling, we need not address the district court's alternative grounds for dismissal.

APPENDIX B

829 F. Supp. 3

Bruce G. MURPHY, pro se, Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORP., as Receiver for Southeast Bank, Defendant.

Civ. A. No. 92-1924 (CRR).

United States District Court,

District of Columbia.

Aug. 10, 1993.

Bruce G. Murphy, pro se.

Brendan Collins, Atty., U.S. Dept. of Justice, Civil Div., Washington, DC, together with Stuart E. Schiffer, Acting Asst. Atty. Gen., J. Ramsey Johnson, U.S. Atty. District of Columbia, John O. Birch, Asst. U.S. Atty., and J. Christopher Kohn, and Robert M. Hollis, U.S. Dept. of Justice, Civil Div., Washington, DC, for defendant.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

The above-captioned case is before the Court on the Plaintiff's Motion for Summary Judgment on Counts I and II, the Defendant's Motion to Dismiss the entire action, and the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss. After careful review of the above motions, the oppositions and replies thereto, and the applicable law, the Court shall grant Summary Judgment for the Defendant.[1]

[1] Because the Defendant's Motion to Dismiss relies on matters outside the pleadings, the Court shall treat the Motion as one for Summary Judgment. *See* Fed.R.Civ.P. 12(c).

I. BACKGROUND

The Plaintiff, Bruce Murphy, was a limited partner in Orchid Island Associates Limited Partnership ("Orchid"), a real estate developer financed by Southeast Bank, N.A. ("Southeast"). Southeast loaned Orchid approximately $50 million between 1988 and 1990.

According to the Complaint, Orchid was the developer of the Orchid Island Golf and Beach Club project near Vero Beach, Florida ("the Project"). In 1989, the Plaintiff invested $515,672.37 to become a limited partner in Orchid. When sales revenues slowed, a plan was devised whereby Orchid would hold a public bond offering to raise funds. Orchid was to take a "bridge" loan from Southeast, and other Orchid principals would take additional loans from Southeast, to carry the project until the bond offering was complete. The proceeds from the bond offering were intended to repay the bridge loan and decrease Orchid's outstanding debt with Southeast. When the participants learned that the bond financing would result in a lien on the project superior to theirs, they rejected the bond offering and the deal fell through. Orchid's financial position subsequently worsened, and Southeast placed Orchid in default on its loans and foreclosed on the Orchid mortgages.

The Plaintiff contends that Southeast, by its actions in connection with the Project, was a partner with Orchid and exercised control over the Project and the actions of Orchid. The Plaintiff contends that Southeast's actions resulted in harm to the Plaintiff's financial interest in the Project. On September 19, 1991, Southeast was declared insolvent and subject to Federal Deposit Insurance Corporation ("FDIC") receivership. On December 16, 1991, the Plaintiff filed a proof of claim with the FDIC for $602,031.54, an amount comprised of the initial investment, expenses, and attorney fees. On June 23, 1992, the FDIC disallowed the Plaintiff's claim stating that the FDIC was not liable for any alleged damages. The FDIC declined to grant an administrative

hearing to review this determination. On August 20, 1992, the Plaintiff brought suit in this Court against the FDIC as receiver for Southeast. The Plaintiff's Complaint alleges breach of fiduciary duties, breach of contract, accounting deficiencies, fraud, negligent misrepresentation, and an unlawful offer to sell securities.

The FDIC has moved to dismiss Counts III through IX of the Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6), arguing that the doctrine of *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and 12 U.S.C. § 1823(e) bar these claims. More specifically, FDIC argues that the Plaintiff cannot sue Southeast under a joint venture theory, because all written documentation on the relationship between Orchid and Southeast explicitly rejects a joint venture relationship. The FDIC has also moved to dismiss the remaining Counts I and II, arguing that under 12 U.S.C. § 1821(d)(7)(A), the FDIC has discretion to determine when to establish administrative procedures to review claims, and that even if the FDIC is obligated to establish such procedures, they have discretion to determine which individual claimants are entitled to review. After careful review of the entire record in this action and the applicable law, the Court concludes that there are no material issues of fact in dispute that would preclude the entry of summary judgment for the Defendant.[2]

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[2] Summary judgment is awarded when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). It is well established that the Court must believe the non-movant's evidence and draw all justifiable inferences in his or her favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed.2d 202 (1986). A factual dispute must be material in order to preclude summary judgment; that is, it must be a dispute that may affect the outcome of the suit under the governing law. *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510.

II. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON COUNTS V THROUGH IX BECAUSE THE PLAINTIFF CANNOT RECOVER AGAINST THE FDIC UNDER AN ALLEGED UNWRITTEN JOINT VENTURE AGREEMENT PURSUANT TO *D'OENCH, DUHME & COMPANY* V. *FDIC*, 315 U.S. 447 (1942), AND 12 U.S.C. § 1823(e).

In Counts V through IX, the Plaintiff alleges breach of fiduciary duty, breach of contract, fraudulent omissions and representations, and negligent misrepresentations by Southeast. The Court concludes that Summary Judgment must be granted for the Defendant on these five claims because the Plaintiff cannot recover against Southeast on any theory of an alleged unwritten joint venture agreement pursuant to *D'Oench*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 and 12 U.S.C. § 1823(e).

The Plaintiff claims that Southeast and Orchid were partners in an unwritten joint venture agreement in connection with the Project. The crux of the Plaintiff's allegations is that Southeast acted in concert with Orchid in making decisions pertaining to the Orchid development that were separate and apart from Southeast's role as a mere lender to Orchid.[3]

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[3] For example, in Count V, the Plaintiff alleges that Southeast breached a fiduciary duty to the Plaintiff by failing to "exercise good faith, reasonable business judgment, and integrity in handling partnership affairs." Compl. at ¶ 40. In addition, in Count VI, the Plaintiff alleges that Orchid and Southeast were parties to an investment agreement with the Plaintiff in August, 1989, whereby the Plaintiff was to be paid an annual monetary sum. The Plaintiff further alleges breach of this contract by Southeast. *See* Compl. at ¶ 43. In Count VII, the Plaintiff alleges that Orchid breached its duty under the April 30, 1989 Accounting of the Second and Restated Limited Partnership, whereby Orchid was to furnish to each limited partner an annual audit report, a quarterly unaudited report, and an annual copy of the 1065 k-1 form. The Plaintiff seeks these documents for 1990 and 1991. However, this Count only refers to Orchid in connection with these reports and thus fails to state a claim against Southeast, and therefore the FDIC, for breach fiduciary duty to provide these reports to the Plaintiff.

Finally, in Count VIII and IX, the Plaintiff alleges that Southeast's failure to inform Orchid of the requirement that the participants approve the proposed bond offering constituted fraudulent omissions and representations and negligent misrepresentations. *See* Compl. at ¶ 47-50. The Plaintiff alleges that these omissions and representations induced Orchid to take an additional loan and expend other resources in anticipation of the bond offering.

However, such a claim is not cognizable under the law absent a written document. A party cannot rely on unrecorded agreements with a bank as the basis for claims or defenses against the FDIC. *D'Oench*, 315 U.S. 447, 62 S. Ct. 676; *Bowen* v. *FDIC*, 915 F.2d 1013 (5th Cir.1990); *see also Franklin Asaph Ltd.* v. *FDIC*, 794 F. Supp. 402 (D.D.C. 1992). Under *D'Oench*, transactions that do not appear on the bank's books are not cognizable in a court of law. *Bowen*, 915 F.2d at 1016. The policy underlying the *D'Oench* doctrine is "to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets [and liabilities] in the portfolios of the banks which [the FDIC] insures." *D'Oench* 315 U.S. at 457, 62 S.Ct. at 679. While the original *D'Oench* case involved a party attempting to use an oral promise as a defense to a suit on a note issued by the FDIC, the modern *D'Oench* doctrine also applies when the FDIC is acting in its capacity as receiver, as is the case here. See *Bell & Murphy & Assoc., Inc.* v. *Interfirst Bank Gateway*, 894 F.2d 750, 753 (5th Cir.1990), *cert. denied*, 498 U.S. 895, 111 S. Ct. 244, 112 L.Ed.2d 203 (1990); *see also Bowen*, 915 F.2d at 1015.

In this case, there are no documents establishing the existence of a joint venture between Orchid and Southeast. Furthermore, the loan agreements here explicitly reject a joint venture between Southeast and Orchid. The first three loan agreements expressly provide that "[t]he Lender is a lender only and shall not be considered a shareholder, joint venturer

or partner of the Borrower."[4] Furthermore, the final loan agreement on March 21, 1991, states that:

> At no time did the Lender engage in or attempt to engage in or in any way involve itself in active management marketing, operation or control of the Project and has not, at any time, acted as a joint venturer in or a partner with the Debtor parties in connection with the Project. In the future, at no time shall Lender be construed as having acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project.

See Defendant's Motion to Dismiss at 6 (emphasis added).

The Plaintiff argues that his claims should not be barred because *D'Oench* only applies to a borrower of the bank who is trying to avoid an obligation. *See* Plaintiff's Opp'n at 4-5. He further contends that the *D'Oench* doctrine does not apply to certain tort claims that do not appear on the books of a failed bank. *Id.* at 3. The Court disagrees. The *D'Oench* doctrine acts as a bar where the Plaintiff is an investor, as well as when the Plaintiff is a borrower. *See In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448, 1461-62 (D.D.C.1992). This is consistent with the logic of *D'Oench* which bars claims by any parties who, unlike depositors, were capable of protecting themselves through written agreements. Id.

Furthermore, "[t]orts and other claims which center around an unrecorded agreement are also barred, even though the plaintiff is not asserting the agreement itself explicitly against the FDIC." *In re NBW Commercial Paper Litigation*, 826 F.Supp. at 1465; *see also, FDIC* v. *State Bank of Virden*, 893 F.2d 139 (7th Cir.1990); *but see*, *Astrup* v. *Midwest Fed. Sav. Bank*, 886 F.2d 1057, 1059-60 (8th Cir.1989). Thus, the claims here are exactly the type of claims which are barred by

[4] This language was contained in the August 30, 1988 loan agreement, the April 13, 1989 loan agreement, and the January 31, 1990 loan agreement.

D'Oench.

In addition, the plain language of § 1823(e) bars this kind of claim.[5] Section 1823(e) provides that:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement--
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (1988) (emphasis added).

Thus, the Plaintiff's claims under the alleged joint venture theory are barred. Accordingly, the Court shall grant Summary Judgment on Counts V through IX for the Defendant.

III. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON THE SECURITIES LAW CLAIMS BECAUSE THE PLAINTIFF HAS NOT STATED ANY INDEPENDENT BASIS FOR

[5] This section is "essentially a codification of *D'Oench*." *Bowen*, 915 F.2d at 1015. Whether the bar of *D'Oench* and section 1823 is coextensive has been debated, *see In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448 (D.D.C.1992) however, such an inquiry is not necessary in the instant case.

SOUTHEAST'S LIABILITY OTHER THAN AN ALLEGED UNWRITTEN AGREEMENT.

In Counts III and IV, the Plaintiff alleges securities law violations which he claims do not rely on a joint venture theory. In Count III the Plaintiff alleges that Orchid violated the registration requirement of the Virginia Securities Act § 13.1-507 by not registering the Orchid partnership units as securities. *See* Compl. at ¶ 35-36. Count IV alleges that the solicitation letter used by "[Orchid], the general partners, and [Southeast]" violated the "Unlawful Offers & Sales Provisions" of the Virginia Securities Act and the Florida Securities and Investor Protection Act. See Compl. at ¶ 38. Because the Plaintiff cannot point to any independent basis for liability against Southeast separate and apart from an alleged unwritten agreement, the Court shall also grant Summary Judgment for the Defendant on these claims.[6]

The Plaintiff argues that he can establish a degree of control by Southeast over the Project sufficient to satisfy § 13.1-522(B) even if he cannot establish the joint venture theory. *See* Plaintiff's Opp'n at 5-6. However, the Plaintiff cannot establish that Southeast was a "material participant" because, as set forth above, all of the written agreements between Orchid and Southeast explicitly reject the proposition that Southeast was anything more than simply a lender to Orchid. To the extent that the Plaintiff attempts to rely on an unwritten agreement to prove these securities violations claims, they are again barred by *D'Oench*. Courts have held

[6] In his Complaint, the Plaintiff does not even mention Southeast in the discussion of Count III, and thus on the face of the Complaint, the Plaintiff does not state any cause of action against Southeast. Not until his Opposition to the Defendant's Motion to Dismiss, does the Plaintiff allege that Southeast is also liable for this alleged violation under Va.Code Ann. § 13.1-522(B) which makes "material participants" in an unlawful sale also liable for any violations. However, even under the theory set forth in the Plaintiff's Opposition, this claim must fail because it is still barred by *D'Oench* and § 1823(e).

that *D'Oench* prohibits any claims based upon an unwritten agreement, even where the claims have been characterized as violations of securities laws. *See In re NBW Commercial Paper Litigation*, 826 F. Supp. at 1466-69; see also [sic] (citing *Kilpatrick v. Riddle*, 907 F.2d 1523, 1529 (5th Cir.1990), *cert. denied*, 498 U.S. 1083, 111 S. Ct. 954, 112 L. Ed.2d 1042 (1991)).[7] Accordingly, the Court shall grant Summary Judgment on Count III for the Defendant.

Even assuming arguendo, that the Plaintiff once had a cognizable securities law claim not arising under a joint venture theory, the Plaintiff's claims would still be barred under § 13.1-522(D) which provides that "[n]o suit shall be maintained to enforce any liability created under this section [including § 13.1-502 and § 13.1-507] unless brought within two years after the transaction upon which it is based." Here the Plaintiff invested in Orchid in August of 1989. *See* Compl. at ¶ 19. However, the Plaintiff did not file the current action until August 20, 1992. *See* Compl. at 1. Thus, the Plaintiff's securities claims are barred under the plain language of the Virginia statute.

IV. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON THE ADMINISTRATIVE CLAIMS BECAUSE, UNDER THE PLAIN LANGUAGE OF THE STATUTE, THE FDIC HAS DISCRETION IN DETERMINING WHETHER TO ESTABLISH PROCEDURES TO REVIEW CLAIMS.

The Plaintiff also seeks declaratory relief and mandamus alleging that the FDIC did not provide the Plaintiff with an

[7] A claim for securities violations against the FDIC is cognizable when the act being sued on has no connection to an unwritten agreement but rather involves an independent basis for liability. *See In re NBW Commercial Paper Litigation*, 826 F. Supp. at 1467-68 (Claim for an unlawful sale of securities in violation of the Securities Act of 1933 not barred by *D'Oench*). However, no such independent basis for liability exists in this case.

administrative hearing or other alternative dispute resolution procedure pursuant to 12 U.S.C. § 1821(d)(7)(A) or 12 U.S.C. § 1821(d)(7)(B) to review the denial his claim. The Court finds however, that the FDIC has discretion in determining whether to establish review procedures, and thus the Court shall grant Summary Judgment for the Defendant on these claims.

The plain language of section 1821(d)(4) provides that the FDIC "may prescribe regulations ... providing for administrative determination of claims and review of such determination." (emphasis added). More specifically, an administrative hearing may be provided "if any claimant requests review ... and the [FDIC] agrees to such request ...." 12 U.S.C. § 1821(d)(7)(A) (emphasis added). Finally, the FDIC may provide other review procedures "as may be appropriate." 12 U.S.C. § 1821(d)(7)(B)(i). These provisions grant the FDIC discretion in determining whether to establish procedures to review claims. Furthermore, courts interpreting these sections have held similarly. *See FDIC* v. *Hanson*, 799 F. Supp. 954, 958 (D.Minn.1992) (FDIC has no obligation under § 1821(d)(4) to establish administrative procedures for the review of its denial of a claim); *see also, Mansolillo* v. *FDIC*, 804 F. Supp. 426, 430 (D.R.I.1992). Finally, even assuming arguendo, that the FDIC was required to establish such procedures, the statute still provides the FDIC with discretion to determine which particular claimants are entitled to review. *See* § 1821(d)(7)(A). Thus, because the Plaintiff is not entitled to an administrative review of his claim, the Court shall grant Summary Judgment on Counts I and II for the Defendant.

V. CONCLUSION

For all the reasons stated above, the Court concludes that the Plaintiff's claims are barred by the doctrine of *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and 12 U.S.C. § 1823(e). Accordingly, the Court shall grant Summary Judgment for the Defendant.

Furthermore, the Court shall deny the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss as moot. The Court shall enter an Order of even date herewith in accordance with this Memorandum Opinion.

ORDER

Upon consideration of the Plaintiff's Motion for Summary Judgment, the Defendant's Motion to Dismiss, and the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss, the oppositions and replies thereto, the arguments of counsel, the record herein, the applicable law, and for the reasons articulated in this Court's Memorandum Opinion of even date herewith, it is, by the Court, this 10th day of August, 1993,

ORDERED that the Plaintiff's Partial Motion for Summary Judgment on Counts I and II shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Defendant's Motion for Summary Judgment on Counts I through IX shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss is DENIED as moot; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

APPENDIX C

61 F.3d 34

Bruce G. MURPHY, Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A., Appellee.

Nos. 93-5268, 93-5412.

United States Court of Appeals,

District of Columbia Circuit.

Argued April 7, 1995.

Decided Aug. 1, 1995.

Rehearing and Suggestion for Rehearing In Banc Denied Oct. 4, 1995.

Appeals from the United States District Court for the District of Columbia (No. 92cv01924).

Bruce G. Murphy, pro se, argued the cause and filed the briefs as appellant.

John P. Parker, Sr. Atty., F.D.I.C., Washington, DC, argued the cause, for appellee. With him on the brief was Ann S. DuRoss, Asst. Gen. Counsel, and Colleen J. Bombardier, Sr. Counsel, F.D.I.C., Washington, DC. Claire L. McGuire and David A. Felt, Attys., F.D.I.C., Washington, DC, entered appearances.

Before: EDWARDS, Chief Judge; WALD and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

Bruce Murphy, an investor in an unsuccessful real estate venture, seeks damages from the FDIC on the theory that the

failed bank that financed the venture, of which the FDIC is the receiver, was responsible for his loss. The district court granted summary judgment in favor of the FDIC upon the ground that the appellant's claims are barred both by federal common law, *see D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and by 12 U.S.C. § 1823(e). We hold that (1) § 1823(e) does not bar Murphy's claims because the FDIC has not demonstrated, as required by that statute, that the FDIC's interest in a specific asset would be diminished if the claims were upheld; and (2) the Supreme Court's recent decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed.2d 67 (1994), removes the federal common law *D'Oench* doctrine as a separate bar to such claims. We therefore reverse the district court and remand the case for further proceedings.

I. BACKGROUND

In his complaint Murphy tells the following story (which we take as true for the purpose of this appeal). In 1989 he paid approximately $515,000 for one "partnership unit" in the Orchid Island Associates Limited Partnership, which was then in the process of developing the Orchid Island Golf and Beach Club near Vero Beach, Florida. The investment contract guaranteed that he would receive a "6.1 multiple return on investment" but to date he has received nothing.

Southeast Bank, N.A. was the lead lender for the Orchid Island project. In the late 1980's and early 1990's the bank made several loans to the partnership, in a total amount approximating $50 million. Southeast was also involved in a plan whereby Orchid would engage in a public bond offering to raise additional funds in order to complete the project. Pursuant to that plan, Orchid would take a "bridge loan" from Southeast to cover expenses until the bonds were sold, and the proceeds from the bond offering would be used both to repay the bridge loan and to reduce the amounts outstanding on Southeast's earlier loans. When Southeast informed Orchid's other lenders that the proposed bond financing would

result in a lien on the project superior to theirs, however, they rejected the proposal and the deal fell through. Orchid subsequently defaulted on its loan obligations, and Southeast foreclosed upon the property. Shortly thereafter Southeast was itself declared insolvent, the FDIC was appointed receiver of the bank, and Murphy filed this lawsuit.

Although somewhat vague, the gravamen of Murphy's claim is that the bank effectively controlled Orchid and thus assumed the role, and the corresponding legal duties, of a joint venturer or partner. Murphy contends that the bank is therefore responsible for various misdeeds allegedly committed by Orchid officials, including: "failure to register securities" (count 3); "unlawful offer and sale of securities" (count 4); "breach of fiduciary duties" (count 5); "breach of contract" (count 6); and "accounting" improprieties (count 7). Murphy further contends that, in its role as promoter of the aborted bond offering, the bank itself engaged in "fraud" (count 8) and made "negligent misrepresentation[s]" (count 9). In addition, Murphy complains that the FDIC has failed to establish alternative dispute resolution (ADR) procedures, as required by statute, and therefore has improperly denied him the opportunity to pursue his claim through an ADR channel (counts 1 and 2). Murphy seeks money damages (in counts 3-6 and 8-9), and an order requiring the FDIC to give him certain accounting statements (count 7) and to adopt ADR procedures and apply them to his claim (counts 1-2).

Each of the loan agreements between Orchid and the bank contains a provision to the following effect: "The Lender is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower." Relying upon those written provisions, Murphy's inability to point to any written agreement that supports his joint-venture theory of liability, the federal common law *D'Oench* doctrine, and 12 U.S.C. § 1823(e), the district court granted summary judgment in favor of the FDIC on counts 3 through 9. The district court also granted summary judgment in favor of the FDIC on the first

two counts, holding that, under the governing statute, the FDIC has the discretion to decide whether to adopt an ADR procedure and, if it does so, whether a particular claim is suitable therefor.

II. ANALYSIS

Murphy raises distinct substantive and procedural points before this court. First, he argues that 12 U.S.C. § 1823(e) does not apply to his substantive claims and that the recent Supreme Court decision in *O'Melveny & Myers* v. *FDIC* makes clear that the federal common law *D'Oench* doctrine has been displaced by a federal statute. Second, he renews his claim that the FDIC is required to establish an ADR procedure and to apply it to his claim.

A. 12 U.S.C. § 1823(e)

In 1950, eight years after the Supreme Court decided *D'Oench*, the Congress enacted the Federal Deposit Insurance Act, 12 U.S.C. § 1811 et seq., which "bars anyone from asserting against the FDIC any agreement not properly recorded in the records of the bank that would diminish the value of an asset held by the FDIC." *E.I. du Pont de Nemours & Co.* v. *FDIC*, 32 F.3d 592, 596 (D.C.Cir.1994). That provision, as modified in 1989 by the Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101-73, 103 Stat. 183 (better known as the FIRREA), currently provides that:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement--
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C.§ 1823(e)(1). The Congress further provided in the FIRREA that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the [FDIC]." 12 U.S.C. § 1821(d)(9)(A).

By their terms, these statutory provisions bar any claim that (1) is based upon an agreement that is either (a) unwritten or (b) if in writing, does not meet the stringent requirements of §§ 1823(e)(1)(B)-(D), and (2) would diminish or defeat the interest of the FDIC in an asset acquired by it in its capacity as receiver of a failed depository institution. Murphy concedes that his claims (save one) are (1) premised upon the existence of an unwritten joint-venture agreement between the bank and Orchid, but argues that § 1823(e) does not bar his claims because (2) the FDIC has failed to demonstrate that its interest in any specific asset assigned from Southeast would be diminished were he to prevail. He points out that he is not a borrower (or "obligor" per the statute) attempting to avoid payment of a loan owed to Southeast Bank but is rather an investor in a failed business venture in which, he claims, the failed bank was a culpable participant. To be sure, Murphy's claims, if successful, would diminish the value of the bank in the hands of the FDIC but that, according to Murphy, is not sufficient to meet the "asset" requirement of § 1823(e). We agree.

We recently held that § 1823(e)(1) is "applicable only to cases involving a specific asset, usually a loan, which in the ordinary course of business would be recorded and approved by the bank's loan committee or board of directors" and that

"the requirements of § 1823(e) effectively limit that provision to conventional loan transactions." *du Pont*, 32 F.3d at 597. That interpretation gains support from subsection (C) of § 1823(e)(1), which specifically requires that, if a suit is to go forward, the agreement upon which it is based must have been approved by "the board of directors of [the bank] or its loan committee." *See In Re NBW Commercial Paper Litigation*, 826 F. Supp. 1448, 1463-64 (D.D.C.1992) (§ 1823(e) applies primarily to loan transactions). An agreement that does not involve an extension of credit would not ordinarily be submitted to the board or to a loan committee for approval. Moreover, while any agreement to make a significant loan will ordinarily meet the exacting requirements of § 1823(e), see *Langley* v. *FDIC*, 484 U.S. 86, 92, 108 S. Ct. 396, 401, 98 L. Ed.2d 340 (1987) (requirements of § 1823(e) "ensure mature consideration of unusual loan transactions by senior bank officials"), those requirements will almost never be met by an agreement between the bank and an investor, a trade creditor, or most clearly, a tort claimant (such as Murphy is, at bottom). Without so much as a "hint in any of Congress' pronouncements that such individuals should be disfavored," *du Pont*, 32 F.3d at 597 (quoting *NBW*, 826 F. Supp. at 1463), it would be positively wanton for a court to construe the asset requirement so broadly as to destroy their otherwise valid claims.

Even if we assume for the sake of argument that the asset requirement of § 1823(e) is so undemanding that § 1823(e) is a defense to any claim that would diminish the FDIC's interest in any asset that it has acquired from a failed bank, including an asset other than a loan, Murphy's claims would still survive. The FDIC does not point to an interest in any specific asset of any type that would be diminished by Murphy's claims. Indeed, the FDIC does not even respond directly to Murphy's assertion that its interest in no specific asset would be diminished, preferring instead to argue only that other courts have applied the federal common law *D'Oench*

doctrine to bar claims that would not diminish its interest in a specific asset. That response not only fails to speak to the proper interpretation of the asset requirement of § 1823(e), it amounts to a near concession that the statute does not bar Murphy's claims and that if the FDIC is to find any refuge it must be in federal common law.

In a footnote to its brief the FDIC does observe that its "recovery from the loan transactions would clearly be diminished by any liabilities arising out of the same transactions." That statement could charitably be read implicitly to argue that the loans that Southeast made to Orchid are the specific assets in which the FDIC's interest would be diminished by Murphy's claims. If that is the FDIC's argument, however, then we find it singularly unconvincing. The value of the loans themselves would be diminished not at all by Murphy's claims. The FDIC may collect those loans or execute upon the property securing them to the same extent regardless whether Murphy prevails upon his damage claims. Only the overall value of the bankrupt's estate, not the receiver's interest in any specific asset, would be diminished if Murphy were to prevail.

Because the FDIC has failed to demonstrate that any specific asset – let alone a specific asset "which in the ordinary course of business would be recorded and approved by the bank's loan committee or board of directors," *du Pont*, 32 F.3d at 597--would be diminished were Murphy to succeed, we reverse the judgment of the district court (which did not discuss the specific asset requirement in holding that § 1823(e) bars Murphy's claims). Although the FDIC does not rely separately upon § 1821(d)(9)(A), the statutory cousin of § 1823(e), we note also that that section simply "incorporates by reference the requirements of § 1823(e)," including the asset requirement, *du Pont*, 32 F.3d at 597, and therefore can not provide an independent ground for judgment in favor of the FDIC.

B. Federal common law: herein of *D'Oench, Duhme & Co.*

The *D'Oench* case involved a securities dealer who had sold certain bonds to a bank insured by the FDIC. The issuer later defaulted on the bonds. In order to allow the bank to avoid carrying past due bonds on its books, the securities dealer executed unconditional notes in the amount of the bonds, pursuant (the dealer alleged) to a secret side agreement that the bank would not call the notes for payment. When the bank failed, however, the FDIC was appointed receiver and it demanded payment of the notes. The Supreme Court held that to allow the securities dealer to rely upon the secret agreement as a defense to payment of its note would violate the policy behind the Federal Reserve Act, *viz.* "to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures." 315 U.S. at 457, 62 S. Ct. at 679.

Thus was born the federal common law doctrine that courts have since expanded "beyond the paradigm in which a debtor seeks to assert a defense to liability on a note held by the FDIC" to bar a variety of both claims made and affirmative defenses raised against the FDIC as receiver. *See du Pont*, 32 F.3d at 597-99 (and cases cited therein). Indeed, in the instant case the district court held that the *D'Oench* doctrine extends to (and therefore bars) Murphy's substantive claim that the bank by its actions assumed the liabilities of a joint-venturer because that theory of liability contradicts the written agreements between the bank and Orchid in the records of the bank.

Although various circuits, including this one, have had occasion to apply the common law *D'Oench* doctrine since the passage of the FIRREA in 1989, Murphy argues that the Supreme Court's recent decision in *O'Melveny & Myers* now makes clear that the common law doctrine was preempted by that statute. To be sure, in *O'Melveny & Myers* the Supreme Court does not flatly state that *D'Oench* has been preempted

by the FIRREA, but it does set forth some more general propositions that, we think, lead ineluctably to that conclusion.

In *O'Melveny & Myers* the FDIC, as receiver of a California savings bank, sued a law firm that had performed services for the bank; it claimed that the firm had been negligent and had breached its fiduciary duty by failing to uncover the wrongdoing of certain officers of the bank. 512 U.S. at ----, 114 S. Ct. at 2052. The district court entered summary judgment in favor of the law firm, apparently upon the ground that under California law knowledge of the employees' misconduct is imputed to the employer – and thence to the FDIC as receiver in the employer's stead. *Id.* The FDIC argued that the question whether to impute knowledge of a bank employee's conduct to the FDIC is governed not by California law but by federal common law. *Id.* The Supreme Court unanimously rejected that contention, holding that the FIRREA preempted the creation of federal common law on this issue and that the rule of decision is therefore to be found either in the federal statute itself or in state law. *Id.* at ---, 114 S. Ct. at 2054.

The Court began its discussion of preemption with the proposition that it "would [not] adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* The Court then turned to 12 U.S.C. § 1821(d)(2)(A)(i), which, as amended by the FIRREA, provides that the FDIC "shall ... by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution," and explained that this provision "appears to indicate that the FDIC as receiver steps into the shoes of the failed S & L [so that] any defense good against the original party is good against the receiver." *Id.*

The Court went on to hold that the above-quoted provision is an exclusive grant of rights to the FDIC as receiver,

which can be neither "supplemented [nor] modified by federal common law." *Id.* Here the Court cited four provisions of the FIRREA--including § 1821(d)(9), which it described parenthetically as "excluding certain state-law claims against FDIC based on oral agreements by the S & L" – that "specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver.... *Inclusio unius, exclusio alterius*." *Id.* The Court concluded this aspect of the opinion with the broad observation:

> It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.

Id.

Although the Court's reasoning appears to leave no room for a federal common law *D'Oench* doctrine, the FDIC here emphasizes that the continuing vitality of *D'Oench* was not directly before the Supreme Court and that the Court did not specifically mention *D'Oench* in its opinion. That is hardly compelling, however, when one considers that "[i]n cases of doubt, the institutional role of the Supreme Court weighs in favor of considering its rulings to be general rather than limited to the particular facts." *Cowin* v. *Bresler*, 741 F.2d 410, 425 (D.C.Cir.1984). That point has particular force in this instance, for while the vitality of *D'Oench* was not directly at issue in *O'Melveny & Myers* the Court was specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the *D'Oench* doctrine. Moreover, although the opinion for the Court does not specifically mention *D'Oench*, it does expressly include one of the *D'Oench*-like statutory provisions (§ 1821(d)(9)) in the list of special federal statutory rules of decision from which it infers that "*[i]nclusio unius, exclusio alterius*." *O'Melveny &*

Myers, 512 U.S. at ----, 114 S. Ct. at 2054. In so doing the Supreme Court, we think, necessarily decided the *D'Oench* question. To translate: the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one.

The FDIC next contends that this interpretation is inconsistent with both the Supreme Court's earlier decision in *Langley* v. *FDIC*, 484 U.S. 86, 108 S. Ct. 396, 98 L. Ed.2d 340 (1987), and the decisions of several lower courts (including this one) holding that *D'Oench* survives the enactment of the FIRREA. The FDIC suggests that in *Langley* the Court signalled the continuing validity of the *D'Oench* doctrine because it relied upon the *D'Oench* case itself to inform its interpretation of the term "agreement" in § 1823(e). Even if we accepted that interpretation of *Langley*, however, it would surely not dispose of the present issue because the Court decided *Langley* before the Congress enacted the FIRREA. In any event, in *Langley* itself the Court suggested, if anything, that *D'Oench* was even then a dead letter:

> That "agreement" in § 1823(e) covers more than promises to perform acts in the future is confirmed by examination of the leading case in the area prior to the enactment of § 1823(e) in 1950 ... *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942)....

Id. at 92, 108 S. Ct. at 401. Referring to *D'Oench* as the leading case "prior to the enactment of § 1823(e) in 1950" implies that *D'Oench* had lost its vitality as federal common law with the enactment of the FDIA in 1950. At most the Court in *Langley* left that question open.

As for the post-FIRREA decisions of the lower courts, the FDIC is undeniably correct in its assertion that many courts, including we, have either explicitly stated or implicitly assumed that the federal common law remains alive and well

alongside its statutory cousin. *See, e.g. du Pont*, 32 F.3d at 596-97; *NBW*, 826 F. Supp. at 1457-61 (and cases cited therein). Most courts, however, have done so "without even considering the preemption question." *NBW*, 826 F. Supp. at 1458. More specifically, not one court has discussed the impact of last year's decision in *O'Melveny & Myers* upon the continuing vitality of *D'Oench*. As the FDIC notes, our own *du Pont* opinion issued after *O'Melveny & Myers*; but it was briefed and argued before the Supreme Court decision issued, and no party in *du Pont* brought the pendency of the issue in *O'Melveny & Myers* to the attention of the court. We can therefore state with confidence that this court has not heretofore decided what impact *O'Melveny & Myers* has upon the *D'Oench* doctrine.

Finally, as a fallback the FDIC characterizes the *O'Melveny & Myers* opinion as a prohibition only upon "the creation of new federal common law," thus suggesting that the Supreme Court decision does not reach the question whether already extant federal common law was preempted by the enactment of the FIRREA. That interpretation is not literally inconsistent with anything the Supreme Court says in *O'Melveny & Myers*: The federal common law rule at issue in that case appears to have been newly announced by the court of appeals post-FIRREA, and at one point the Court framed the issue before it as whether to "adopt a court-made rule to supplement federal statutory regulation." 512 U.S. at ----, 114 S. Ct. at 2054.

The problem with such a narrow focus upon *O'Melveny & Myers* is that it excludes from view all that the Supreme Court has said before about the impact of comprehensive new legislation upon existing federal common law. Although federal common law is sometimes a "necessary expedient," *Milwaukee* v. *Illinois*, 451 U.S. 304, 314-15, 101 S. Ct. 1784, 1791-92, 68 L.Ed.2d 114 (1981), the Court has made clear that

> when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears.... [The Court's] commitment to the separation of powers is too fundamental to continue to rely on federal common law ... when Congress has addressed the problem.

By stating that "§ 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise," *O'Melveny & Myers*, 512 U.S. at ----, 114 S. Ct. at 2054, the Supreme Court appears to have concluded that the Congress in the FIRREA did indeed address the question previously governed by *D'Oench*. It follows that the need for a body of federal common law under the rubric of *D'Oench* has now "disappeared" and that the district court erred in holding that Murphy's claims are barred under *D'Oench*.

C. The procedural claims

In count 1 of his complaint Murphy seeks a declaratory judgment that the FDIC is required by statute to establish an ADR procedure and to offer Murphy the option of resolving his claim through that procedure; in count 2, he seeks a writ of mandamus compelling that result. The district court granted summary judgment in favor of the FDIC on both counts.

The FIRREA does seem to require the FDIC either to establish an ADR process or to explain why such a process is not appropriate for resolving any claims. 12 U.S.C. § 1821(d)(7)(B)(i) ("The [FDIC] shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims"). The FDIC appears, however, to have initiated an ADR program since Murphy raised his dispute with the agency. *See* Resolution of the Board of Directors of the FDIC Concerning the Implementation of ADR

(Dec. 20, 1994). Therefore, Murphy's request that we order the FDIC to take that step appears to be moot.

As for Murphy's request for an order compelling the FDIC to direct his case to an ADR process, we see that the statute gives the agency the discretion to decide whether to refer any particular case to ADR. 12 U.S.C. § 1821(d)(7)(B)(iii) ("all parties, including ... the [FDIC], must agree to the use of [an ADR] process in a particular case"). Consequently, we decline Murphy's invitation to compel such action.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the FDIC on counts 1 and 2 and reverse the district court's grant of summary judgment on counts 3 through 9. The latter claims are remanded to the district court for further proceedings consistent with this opinion.

So ordered.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE G. MURPHY,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

Civil Action No. 92-01924 (CRR)

FILED

Aug 21 1996

Nancy Mayer-Whittington, Clerk
U.S. DISTRICT COURT

ORDER

On August 7, 1996, the parties appeared before the Court, by telephone, for a status conference in the above-captioned litigation. At that time, the Court held a colloquy with the parties regarding the location of the plaintiff and the witnesses, as well as the prior location of the depository institution, Southeast Bank, N.A. The plaintiff and the vast majority of the fact witnesses reside in the Southern District of Florida. The failed real estate development that is the subject of this dispute is located in the Southern District of Florida. Prior to its failure, Southeast Bank, N.A. was located in Miami. Additionally, the plaintiff asserts a number of Florida state law claims in his Amended Complaint. After hearing argument from the parties concerning the transfer of this case to the United States District Court for the Southern District of Florida, the Court determined that in the interest of justice and for the convenience of the parties and witnesses, the Court shall

transfer this case to the Southern District of Florida. Accordingly it is, by the Court, this 20th day of August, 1996,

ORDERED that the above-captioned case shall be transferred to the United States District Court for the Southern District of Florida, pursuant to 28 U.S.C. § 1404(a), where venue is appropriate pursuant to 12 U.S.C. § 1821(d)(6)(A).

/S/

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-2614-CIV-MOORE
Magistrate Judge Turnoff

BRUCE G. MURPHY,
Plaintiff,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Southeast Bank, N.A.,
Defendant.

ORDER

FILED BY [SR] D.C.
May 11 1998
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

THIS CAUSE comes before the Court upon Defendant FEDERAL DEPOSIT INSURANCE CORPORATION's ("FDIC") Motion to Substitute Party Defendant, filed May 7, 1998. After due consideration, it is hereby:

ORDERED that Defendant's Motion is GRANTED, and that Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A. ("SEBNA"), is substituted as the party defendant in this lawsuit, in the place and stead of the FDIC, which was previously the Receiver of SEBNA.

Done and Ordered, in chambers, Miami, Florida, this 11th day of May, 1998.

/S/

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Case No. 96-2614-CIV-MOORE

BRUCE G. MURPHY,

Plaintiff,

vs.

ORDER

FILED BY [AM] D.C.
JUL 27 1998
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

JEFFREY H. BECK, as Successor Agent for the Federal Deposit Insurance Corporation as Receiver for Southeast Bank, N.A.,

Defendant.
_____/

THIS CAUSE came before the Court upon Defendant"s Motion to Dismiss (filed June 14, 1996 in United States District Court for the District of Columbia).

UPON CONSIDERATION of the motion, responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

BACKGROUND

In August 1989, Plaintiff Bruce Murphy ("Murphy") invested $515,672.37 to purchase a limited partnership interest in Orchid Island Associates Limited Partnership ("Orchid").

Orchid was formed to develop the Orchid Island Golf and Beach Club Project (the "Project") for which Southeast Bank ("Southeast") was the lender. Pursuant to various loan agreements, Southeast loaned Orchid approximately $50 million dollars between 1988 and 1991. Orchid eventually defaulted on its loans and Southeast foreclosed on the property. Southeast itself was declared insolvent on September 19, 1991 and placed in Federal Deposit Insurance Corporation ("FDIC") receivership. On May 11, 1998, this Court permitted Jeffrey Beck ("Beck"), as Successor Agent to the FDIC as Receiver for Southeast to be substituted as the party defendant in this action.

In this action, Murphy alleges that Southeast, by its actions in connection with the Project, was a joint venturer or de facto partner with Orchid and that Southeast controlled the project. Murphy alleges that Southeast's actions caused the loss of his investment. Murphy filed this action in August 1992 before the United States District Court for the District of Columbia alleging breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations. The FDIC moved to dismiss the complaint on the grounds that Murphy's claims were barred by the doctrine of D'Oench, Duhme & Company v. FDIC, 315 U.S. 447 (1942), and, more specifically, that Murphy could not sue Southeast under a joint venture theory because all written documentation on the relationship between Orchid and Southeast explicitly rejected a joint venture relationship. On August 10, 1993, the United States District Court for the District of Columbia granted the FDIC's Motion to Dismiss. Murphy v. FDIC, 829 F. Supp. 3 (D.D.C. 1993). Citing the D'Oench doctrine, the court held that Murphy could not assert a claim against the FDIC based on the theory that Southeast was a joint venturer in the Project because there was no written joint venture agreement. On appeal, the Court of Appeals for the D.C. Circuit reversed the majority of the district court's decision, holding that the D'Oench doctrine

was inapplicable. Murphy v. FDIC, 63 F.3d 34 (D.C. Cir. 1995).

On May 29, 1996, subsequent to the D.C. Circuit's decision, Murphy filed an Amended Complaint seeking declaratory relief (Count I), mandamus (Count II)[1] and alleging a failure to register securities (Count III), unlawful offer and sale of securities (Count IV), breach of fiduciary duty (Count V), breach of contract (Count VI), accounting irregularities (Count VII), fraud (Count VIII), RICO violations (Count IX), negligent misrepresentation (Count X) and negligence (Count XI).[2] Beck once again moves to dismiss the entire complaint, arguing the loan documents explicitly refute the existence of a joint venture agreement, or in the alternative, on various substantive grounds.

DISCUSSION

I. Motion to Dismiss Standard

A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. Milburn v. United States, 734 F.2d 762, 765 (11th Cir. 1984). On a motion to dismiss, the Court notes that it must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir. 1988), cert. denied sub nom. Peat Marwick Main & Co. v. Tew, 486 U.S. 1055 (1988). A court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no

---

[1] FDIC was granted summary judgment on Counts I and II and thus these Counts are no longer before this Court. Murphy. FDIC, 61 F.3d 34 (D.C. Cir. 1995).

[2] By Order dated August 20, 1996, United States District Judge Charles R. Richey transferred this case to the Southern District of Florida. Judge Richey found that the plaintiff and vast majority of witnesses resided in this district. In addition, the failed land project is located in this district and Southeast Bank was originally located in Miami. Upon transfer, the case was assigned to this Court.

set of facts in support of his claim which would entitle him to relief." Conley v. Gibson. 355 U.S. 41, 45-46 (1957) (citations omitted); South Florida Water Management Dist. v. Montaivo, 84 F.3d 402, 406 (11th Cir. 1996). Nonetheless, to withstand a motion to dismiss, it is axiomatic that the complaint must allege facts sufficiently setting forth the essential elements of a cause of action.

II. Existence of a Joint Venture

Beck argues that because the alleged joint venture between Southeast and Orchid is evidenced by actions taken by Southeast, rather than by any written joint venture agreement, this action should be dismissed because the loan documents expressly disclaim the existence a joint venture. In this case, there are no documents creating a joint venture between Southeast and Orchid. Furthermore, the loan agreements at issue in this case expressly reject a joint venture between Southeast and Orchid. The first three loan agreements, dated August 30, 1998, April 13, 1989 and January 31, 1990, explicitly provide that "[t]he Lender [Southeast] is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower [Orchid]." In addition, the final loan agreement, dated March 21, 1991, states:

> At no time did the Lender engage in or attempt to engage in or in any way involve itself in active management marketing, operation or control of the Project and has not, at any time, acted as a joint venturer in or a partner with the Debtor parties in connection with the Project. In the future, at no time shall Lender be construed as having, acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project (emphasis added).

The plain language of the agreements is clear: No joint venture existed between Southeast and Orchid. See also FDIC v. Key Biscayne Develop. Assoc., 858 F.2d 670 (11th Cir. 1988) (observing that construction of a contract is a matter for the court to decide and expressly finding that agreements containing the language "It is understood and agreed that [Continental]. . . by issuing this loan or by taking any action pursuant hereto shall not be deemed a partner or joint venturer . . ." was clear evidence that the loan agreements did not create a joint venture).

Murphy does not dispute that the agreements contain express disclaimer language. Murphy argues, however, that he was not a party to any of the agreements containing the disclaimers and that "Florida law clearly permits a third party such as Murphy to establish the existence of a joint venture or de facto partnership relationship notwithstanding a purported disclaimer of a joint venture between the alleged joint venturers." Murphy's argument is flawed for two reasons: First, Murphy is not a third party who was "not a party to the disclaimer agreement." Murphy, by virtue of his investment, was a limited partner in Orchid. Orchid is the signatory on each of the loan documents. Thus, as a limited partner in Orchid, Murphy is a party to, and bound by, the agreements. In addition, even were Murphy correct in arguing he was not a party to the agreements, there is still no evidence of a joint venture. Under Florida law, courts generally look at five elements to determine whether a joint venture exists: (1) community of interest in the performance of a common purpose; (2) joint control or right of control; (3) joint proprietary interest in the subject matter; (4) right to share in the profits; and (5) a duty to share in the losses. Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957). A review of the loan agreements in this case fails to establish the existence of a joint venture, particularly because there is no evidence that Southeast had a right to share in any profits or any duty to share in any losses.

The Court further notes that the D'Oench doctrine prevents Murphy from stating a claim. As recognized by the United States District Court for the District of Columbia in ruling on the original motion to dismiss, Murphy's claim "is not cognizable under the law absent a written document . . .

and transactions that do not appear on the bank's books are not cognizable in a court of law." Murphy, 829 F. Supp. at 5-6. The District of Columbia Court of Appeals reversed, citing the Supreme Court decision in O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) and expressly stating that the federal common law D'Oench doctrine has been displaced by federal statute. Murphy, 61 F. 3d at 36. In direct contrast to the D.C. Circuit, however, the Eleventh Circuit still adheres to the D'Oench doctrine. In Motorcity of Jacksonville Ltd. v. Southeast Bank, 83 F.3d 1317 (11th Cir. 1996), the Eleventh Circuit specifically "disagree[d] with Murphy's reliance on O'Melveny" and held that the federal common law D'Oench doctrine was not preempted. Id. at 1333-34. Accordingly, because the D'Oench doctrine is still valid in this circuit, the Court finds the district court's reasoning in Murphy persuasive that, in addition to the reasons stated above, the D'Oench doctrine prevents Murphy from stating a valid claim.

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that Beck's Motion to Dismiss is GRANTED. The Clerk of Court shall mark this case CLOSED. All motions not otherwise ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of July, 1998.

/S/

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: Hilare Bass, Esq.
John F. Bloss, Esq.

APPENDIX G

UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 16--FEDERAL DEPOSIT INSURANCE CORPORATION
[EXCERPT]

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Current through P.L. 106-180, approved 3-17-2000

§ 1823. Corporation monies

* * * *

(e) Agreements against interests of Corporation

(1) In general

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

(2) Public deposits

An agreement to provide for the lawful collateralization of deposits of a Federal, State, or local governmental entity or of any depositor referred to in section 1821(a)(2) of this title shall not be deemed to be invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or with any changes in the collateral made in accordance with such agreement.

* * * *

APPENDIX H

UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 16--FEDERAL DEPOSIT INSURANCE CORPORATION
[EXCERPT]

* * * *

(d) Powers and duties of Corporation as conservator or receiver

* * * *

(9) Agreement as basis of claim

(A) Requirements

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

(B) Exception to contemporaneous execution requirement

Notwithstanding section 1823(e)(2) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

* * * *

Supreme Court, U.S.
FILED
AUG 24 2000
CLERK

(2)

No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1998, after the Federal Deposit Insurance Corporation announced its policy decision to refrain from invoking the common-law rule of *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), in post-1989 litigation, this Court declined to review the Eleventh Circuit's decision in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998). At that time, there existed the very same inter-Circuit conflict that is urged upon the Court by petitioner in his attempt to secure review of the Eleventh Circuit's decision in this case. The Eleventh Circuit's unremarkable application of its own precedent presents no issue for review by this Court that was not presented in 1998, and the need for resolution of this relatively-minor doctrinal dispute among some of the Circuits has, if anything, significantly lessened over time.

The question presented is:

Whether, in the absence of express congressional intent, the common-law *D'Oench* doctrine was abrogated by 12 U.S.C. §§ 1821(d)(9) and 1823(e), as adopted in 1989.

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62 Fed. Reg. 5984 (Feb. 10, 1997) 10

The Respondent, Jeffrey H. Beck, as successor agent for Southeast Bank, N.A., respectfully requests this Court to deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Eleventh Circuit, attached as Appendix A to the Petition, is reported at 208 F.3d 959 (11th Cir. 2000). The opinion of the district court, attached as Appendix F, is unreported.

STATEMENT OF JURISDICTION

Petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner has reproduced the pertinent statutory provisions, 12 U.S.C. §§ 1821(d)(9) and 1823(e), in his Appendix G and Appendix H.

STATEMENT OF THE CASE

Petitioner Murphy instituted an action in the United States District Court for the District of Columbia against the FDIC, as receiver for Southeast Bank, in August 1992, alleging that Southeast had served as the lender for a development in Indian River County, Florida, and had participated in fraudulent activities by the developer's principals. Appendix A at 2-3. On the FDIC's motion, the district court dismissed Murphy's claims under the *D'Oench* doctrine. *Id.* at 3. On Murphy's appeal, the Court of Appeals for the D.C. Circuit reversed (on all but two counts of the

complaint), holding that the *D'Oench* doctrine had been preempted by the 1989 adoption of 12 U.S.C. § 1821(d)(9). *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995). Appendix A at 3-4.

Following the D.C. Circuit's remand, the district court, on its own motion, transferred Murphy's action to the Southern District of Florida. Appendix A at 4. The district court in Florida dismissed Murphy's complaint on three independent bases, one of which was that Murphy's claims are barred under the *D'Oench* doctrine. *Id.*

On appeal, the Eleventh Circuit determined that it should apply its own precedent and rejected Murphy's claim of entitlement to the ruling by the D.C. Circuit. Appendix A at 7-11. The court also rejected Murphy's argument that *D'Oench* should not be applied because a surplus existed in the FDIC's receivership. *Id.* at 13. The court then declined to reconsider its prior *en banc* holding that the *D'Oench* doctrine has *not* been supplanted by 12 U.S.C. §§ 1821(d)(9) and 1823(e). Appendix A at 15-18.

REASONS FOR DENYING THE WRIT

For almost 60 years, the common-law rule of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), has peacefully coexisted with statutes governing the various federal agencies that have enforced the banking laws. Neither in 1950, when the Congress partially codified *D'Oench* in the original version of 12 U.S.C. § 1823(e), nor in 1989, when — in response to a national crisis in the savings and loan industry — the Congress enacted the Financial Institution's Reform, Recover, and Enhancement Act (FIRREA), did the Congress even intimate that the *D'Oench* doctrine was being supplanted by statutory law. Nonetheless, by 1997, a split of authority had developed among three Circuits, with the

D.C. Circuit stating for the first time in *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995) that *D'Oench* had been preempted by FIRREA, and the Eleventh Circuit holding on the other hand that *D'Oench* survived FIRREA because, under the governing principles of *United States v. Texas*, 507 U.S. 529 (1993), the Congress could not be deemed to have silently discarded the doctrine. *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (*en banc*), *vacated and remanded*, 519 U.S. 1087 (1997), *on remand*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998).

In light of this Court's decision in *Atherton v. FDIC*, 519 U.S. 213 (1997), the Court remanded the Eleventh Circuit's *Motorcity* decision for further consideration in light of the *Atherton* holding. *Hess v. FDIC*, 519 U.S. 1087 (1997). On remand, the Eleventh Circuit reaffirmed its holding that *D'Oench* survives FIRREA, and this Court declined to review that decision. *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140, 1142-44 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998). Nothing has happened since that denial of review in *Motorcity* to warrant review by this Court now.

The decision presently brought for review merely applies the court's *Motorcity* precedent, and this Court's previous denial of alleged conflict review.[1] If anything, the passage

1. The happenstance that Bruce G. Murphy was the prevailing party before the D.C. Circuit and the losing party before the Eleventh Circuit, while ironic, is of absolutely no moment. As reflected in the Eleventh Circuit's opinion — and *never* challenged by Murphy before that court — the District of Columbia District Court transferred the case to the Southern District of Florida because Murphy's claims arose in Florida. Appendix A at 2-4. Simply stated, Murphy's case should have been before a district court within the jurisdiction of the Eleventh Circuit in the first instance.

of time since *Motorcity II*, and the FDIC's decision announced shortly after the remand order in *Motorcity* that the FDIC will not assert the *D'Oench* doctrine in post-1989 litigation, have served to further minimize the import of the minor doctrinal conflict among the circuits.

I.

THE BACKGROUND OF THE ASSERTED INTER-CIRCUIT CONFLICT.

Four years after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), this court announced in *D'Oench* the common-law principle that "side agreements" between a bank and its customers may not be invoked against the FDIC following the takeover of a failed bank. 315 U.S. at 455-60. The rule created in *D'Oench* was intended to protect the FDIC "and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks." *Id.* at 457. Eight years later, the Congress partially codified the *D'Oench* doctrine by enacting the following language in 12 U.S.C. § 1823(e)(1) (1950):

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder . . . , (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Id.

There are important distinctions between the common-law doctrine and the 1950 version of Section 1823(e), most notably that the statute did not apply to the FDIC acting as a receiver and did not apply to the former Federal Savings & Loan Insurance Corporation. The legislative history of Section 1823(e), however, reflected no Congressional intention to displace or supplant the *D'Oench* doctrine. *FDIC v. McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (noting the absence of any mention of *D'Oench* in the legislative history of the 1950 amendment and concluding that "there is no reason to suppose that Congress intended to forbid the rule of estoppel from being applied" in extra-statutory contexts). As the Eleventh Circuit noted in the original *Motorcity* decision, following the enactment of Section 1823(e) the federal courts looked to the *D'Oench* doctrine in instances in which the statutory language did not pertain, ultimately developing a common-law principle that a private party may not enforce a secret agreement against a federal deposit insurer. *Motorcity I*, 83 F.3d at 1325-26 (citation omitted). In this Court's only decision addressing Section 1823, the Court recognized the unique relationship between *D'Oench* and the statute and, indeed, looked to *D'Oench* to support its construction of Section 1823(e) as applying to "agreements" beyond only those constituting "promises to perform acts in the future." *Langley v. FDIC*, 484 U.S. 86, 92 (1987).

Thus, for over 30 years the federal courts applied Section 1823(e) and the *D'Oench* doctrine "as two overlapping tools available to the FDIC when it seeks to recover funds due upon notes it has acquired after a bank fails." John B. Shumadine, *Striking a Balance: Statutory Displacement of Established Federal Common Law and the D'Oench Doctrine in Murphy v. F.D.I.C. and Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 51 ME. L. REV. 129, 144 (1999) (hereinafter *Striking a Balance*).

The potentially-disastrous savings and loan crisis that came to light in 1988 and impelled the Congress to enact FIRREA is well-documented. H.R. REP. NO. 101-54 [I], at 302-07 (1989), *reprinted in* 1989 U.S.C.C.A.N. 87. FIRREA was intended by the Congress to provide the FDIC with the "power to take all actions necessary to resolve the problems posed by a financial institution in default." *Id.* at 330. To that end, Section 1823(e) was extended to the FDIC acting as a receiver (12 U.S.C. § 1823(e), *see* Appendix G), to the newly-created Resolution Trust Corporation in both receivership and corporate capacities (12 U.S.C. § 1441a(b)(4)(A)), and to bridge banks. 12 U.S.C. § 1821(n)(4)(I). Congress also adopted 12 U.S.C. § 1821(d)(9)(A) to shield the FDIC from claims based upon agreements that do not satisfy Section 1823(e). (*See* Appendix H).

Once again, however, Congress voiced no intention to displace or supplant the *D'Oench* doctrine despite an expansion of the statutory reach. *Striking a Balance*, *supra* at 150 ("There is no affirmative indication that FIRREA was intended to displace the *D'Oench* common law rule.") (footnote omitted). The simultaneous amendment of Section 1823(e) in connection with the adoption of Section

1821(d)(9)(A) evince an intent "to protect the FDIC and to minimize future losses" by expanding the protection given the FDIC when it acquires assets following a bank failure. *Id.* at 151 n.158. While *D'Oench* and the statutory provisions are often construed "in tandem . . . the common-law doctrine and the statute remain separate and independent grounds for decision." *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir.), *cert. denied*, 522 U.S. 928 (1997).

The D.C. Circuit's decision in *Murphy v. FDIC*, holding that *D'Oench* nonetheless has been supplanted by FIRREA, reflects the court's perception of a departure in this Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) from the pre-1989 co-existence between *D'Oench* and statutory law. This Court's silence in *O'Melveny* on the subject of the *D'Oench* doctrine notwithstanding, the D.C. Circuit determined that "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute — of which the *D'Oench* doctrine is one." *Murphy v. FDIC*, 61 F.3d at 39. The Eighth Circuit, in *DiVall Insured Income Fund Limited Partnership v. Boatmen's First National Bank of Kansas City*, 69 F.3d 1398 (8th Cir. 1995), ruled to the same effect. *Id.* at 1402.

In its first *en banc* decision in the *Motorcity* litigation, the Eleventh Circuit faulted the D.C. Circuit and the Eighth Circuit for applying *O'Melveny* outside of its proper context. As the court noted, *O'Melveny* addressed "whether the federal courts should create a *new* federal common-law doctrine in an area in which Congress had not expressed any special concern, nor indicated that a special federal rule of decision should govern." 83 F.3d at 1330 (emphasis added; footnote omitted). Instead, the Eleventh Circuit looked to

this Court's decision in *United States v. Texas*, 507 U.S. 529 (1993) — a decision never mentioned or addressed by the D.C. Circuit and the Eighth Circuit — to guide it in determining the *actual* question presented, *i.e.*, whether a *pre-existing* rule of federal common law will survive a statutory enactment which moves partially in the same field. 83 F.3d at 1330-31. Noting that FIRREA does not "comprehensively address the substance of the federal common law *D'Oench* doctrine," that the Congress instead had carried over the statutory language originally enacted in 1950, and that "when Congress addressed this special area of federal concern as a small part of the overall crisis in the banking industry, Congress was looking at forty years of harmonious coexistence of the common law doctrine and the statute," the Eleventh Circuit concluded that "Congress did not intend to preempt the prior federal common law *D'Oench* doctrine." *Id.* at 1332-33. The Fourth Circuit adopted the Eleventh Circuit's holding. *Young v. FDIC*, 103 F.3d at 1187.

In this Court's *Atherton* decision, the Court held that the common-law standards enunciated in *Briggs v. Spaulding*, 141 U.S. 132 (1891), governing federally chartered banks did not survive *Erie*, and that the prior, federal common law standard was displaced by the elimination of federal common law in *Erie*. 519 U.S. at 224-31. Following this Court's remand in *Motorcity*, the Eleventh Circuit noted the disparity between that situation and FIRREA's possible impact on *D'Oench* to hold that "*Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine." *Motorcity II*, 120 F.3d at 1143 (footnote omitted). Again relying on *United States v. Texas*, the Eleventh Circuit held that "the most reasonable reading

of Congress's intent [is] that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year co-existence of the statute and the *D'Oench* doctrine." *Id.* at 1144. Significantly, fully aware of *Atherton*, *Murphy*, *DiVall* and *Young*, the Court declined to review the second *Motorcity* decision.

II.

PETITIONER PRESENTS NO CASE FOR REVIEW BY THIS COURT.

It is not every conflict of decisions among the circuits that warrants a grant of certiorari in this Court. U.S. Sup. Ct. R. 10(a). The doctrinal differences among the Circuits that have taken varying courses post-FIRREA on the survival of *D'Oench* notwithstanding, the *actual* consequences are minimal at best. As the relative paucity of recent decisions on this issue indicates, a number of factors have coalesced to render the conflict all but moot. First, the FDIC — the entity for which the *D'Oench* doctrine was created and for which Sections 1823(e) and 1821(d)(9) were enacted — has announced a policy of non-reliance on *D'Oench* for post-1989 cases:

> In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, . . . these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent that such claims would be barred by the *D'Oench* doctrine.
>
> * * *

> Accordingly, . . . the FDIC will assert the *D'Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D'Oench* doctrine. For claims that relate to agreements or arrangements entered into *after* the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). . . .

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depositor Institution Prior to Receivership, 62 Fed. Reg. 5984, 5985 (Feb. 10, 1997) (emphasis added).[2]

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2. While Murphy impugns the FDIC's policy statement as "legally meaningless" implying that the FDIC will not adhere to its declared policy, Petition at 15 & n.11, the authority cited by Murphy, by his own admission, shows precisely the contrary. That is, the precedent shows that the FDIC is applying *D'Oench* to *pre-FIRREA* cases. *Id.* at 13-15. The only purportedly-contrary precedent cited by Murphy, *FDIC v. Boone (In Re Boone)*, 235 B.R. 828 (Bankr. D.S.C. 1998), Petition at 15, reveals itself upon close examination to be no indicium of the FDIC's alleged disregard of its policy. Rather, the bankruptcy court in that case — which lies within a Circuit that regards *D'Oench* as having survived FIRREA, *see Young v. FDIC*, 103 F.3d at 1187 — treated the common-law *D'Oench* doctrine and Section 1823(e) as *co-extensive* and ultimately *rejected* the FDIC's position. 235 B.R. at 835 & n.11 and 836-37. The FDIC appears faithfully to be following the policy statement. *E.g.*, *Point*

(Cont'd)

To be sure, successors, transferees, and assignees of the FDIC (and its predecessors) have been permitted to invoke the *D'Oench* doctrine in the FDIC's stead. *E.g.*, *Motorcity I*, 83 F.3d at 1325; *Newton v. Uniwest Financial Corp.*, 967 F.2d 340, 346 (9th Cir. 1992). Post-FIRREA, the Eleventh Circuit has held that the same rule obtains, *First Union National Bank of Florida v. Hall*, 123 F.3d 1374, 1379 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1135 (1998), the Fourth Circuit has suggested that assignees are within the scope of Section 1823(e), *Federal Financial Co. v. Hall*, 108 F.3d 46, 49-50 (4th Cir.), *cert. denied*, 522 U.S. 858 (1997), and the Eight Circuit (after having adopted the D.C. Circuit's *Murphy* rationale) declined to reach the question whether successors are entitled to protection under Section 1823(e) and tolerated the district court's ruling that the statute applies to successors. *Kessler v. National Enterprises, Inc.*, 165 F.3d 596, 599 n.2 (8th Cir. 1999). The First Circuit, which had elected not to address the question whether *D'Oench* survives as common-law doctrine independent of FIRREA, *e.g.*, *FDIC v. Houde*, 90 F.3d 600, 605 n.5 (1st Cir. 1996), treats Section 1823 and *D'Oench* as a single doctrine and has heard *D'Oench* claims raised by an assignee of the FDIC, albeit without addressing the question. *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68-69 (1st Cir. 1999). Until such time as the Circuits' views on the question whether Section 1823(e) may be invoked by the successors and assigns of the FDIC coalesces or develops into a recognizable split of authority, the right of successors such as respondent to invoke *D'Oench* presents no compelling basis for addressing the existing disparate views.

(Cont'd)

Developers, Inc. v. FDIC, 961 F. Supp. 449, 458 (E.D.N.Y. 1997) (noting that the FDIC "invokes only sections 1821(d)(9)(A) and 1823(e) in support of its motion, not the common law *D'Oench, Duhme* doctrine").

History has demonstrated the wisdom of this Court's disinterest in this conflict when it was first placed squarely before the Court by *Motorcity II*. The question of the *D'Oench* doctrine's survival has not much occupied the attention of the courts of appeal since this Court's denial of certiorari in *Motorcity II*. The First Circuit, as previously noted, has declined to address the issue thus far, as has the Tenth Circuit in *FDIC v. Noel*, 177 F.3d 911, 918 n.5 (10th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 935 (2000). The Ninth Circuit has taken as a "given" that *D'Oench* remains vital while declining to apply the doctrine in the particular situation where the FDIC acts as a receiver and "merely stands in the shoes of the insolvent bank." *Ledo Financial Corporation v. Summers*, 122 F.3d 825, 829 & n.2 (9th Cir. 1997). Only the Third Circuit has firmly committed to the rationale of *Murphy v. FDIC*, although without consideration of the Court's denial of certiorari in *Motorcity II*. *FDIC v. Deglau*, 207 F.3d 153, 170 (3d Cir. 2000).[3] Even the D.C. Circuit has not had occasion to apply its rejection of *D'Oench* as a viable common law doctrine. *Striking a Balance*, *supra* at 157 & n.213.[4]

3. The *Deglau* decision issued on March 13, 2000, long after the issuance by the Eleventh Circuit of *Motorcity II* and this Court's denial of certiorari. Nonetheless the Third Circuit looked only to this Court's decision in *Hess v. FDIC* (which vacated and remanded *Motorcity I* for reconsideration in light of *Atherton v. FDIC*), to discount *Motorcity* as viable precedent. *Deglau*, 207 F.3d at 170. Moreover, the Third Circuit treated the Ninth Circuit's decision in *Ledo* as holding that "*D'Oench* is not applicable federal common law," 207 F.3d at 170, when, as has been explained above, that is simply an inaccurate characterization of *Ledo*.

4. It probably was not even necessary for the D.C. Circuit to have reached the question whether *D'Oench* survived FIRREA in order to dispose of Mr. Murphy's case. Section 1823(e) pertains to (Cont'd)

In the end, it is readily seen that Murphy has overstated the import of what is nothing more than a minor doctrinal conflict among the circuits. It is simply counterintuitive to suggest that a great many cases arising from *pre*-1989 claims are being brought — or, in light of limitations considerations, will be brought. The FDIC's decision to rely solely on the FIRREA statutes in post-1989 claims takes much of the force out of Murphy's argument. The narrower question of whether successors or assigns of the FDIC may invoke *D'Oench* is far too minor at the present time to warrant consideration of the overarching doctrinal issue.

The only interstice at which the differing views of the Eleventh Circuit and the D.C. Circuit bisect is when a party's defense or claim is unrelated to a "specific asset," *and* the

(Cont'd)
identified assets held by the FDIC, and the statute bars certain defenses to the FDIC's collection on such assets. 12 U.S.C. § 1823(e). Section 1821(d)(9)(A) operates as a bar to *an affirmative claim against the FDIC*, like Murphy's claim, when such a claim fails to satisfy the requirements of Section 1823(e). 12 U.S.C. § 1821(d)(9)(A). In other words, Section 1823(e) bars the advancement of those *defenses* that fail to satisfy its provisions, and Section 1821(d)(9)(A) incorporates the requirements of 1823(e) so that they operate to bar those affirmative *claims* that fail to satisfy the requirements of Section 1823(e). Murphy's claim was governed by Section 1821(d)(9)(A), and, by operation of that Section, subject to the requirements of Section 1823(e). One of the requirements of Section 1823(e) is that the agreement forming the basis of a defense or claim concern an identified "asset acquired by" the FDIC. 12 U.S.C. § 1823(e). The very fact on which the DC Circuit's decision turned, *i.e.*, that Murphy's claim did not involve a "specific asset" acquired by the FDIC — should have compelled a ruling under Section 1821(d)(9)(A) in the FDIC's favor without the necessity of addressing whether *D'Oench* retains its vitality.

FDIC is out of the picture by virtue of a succession, transfer or assignment. The universe of cases in which varying results *might* be reached — depending upon a particular circuit's view on the question whether *D'Oench* survives — is miniscule, if not virtually non-existent. This Court's denial of certiorari here, coming on the heels of the Court's denial of certiorari in *Motorcity II*, should provide guidance enough in the limited area where the issue of *D'Oench* viability may surface in the future.

CONCLUSION

Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

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No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

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REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari should be granted because the circuits are divided over whether the federal common-law *D'Oench* doctrine remains valid and that question has substantial continuing significance. Respondent's Brief in Opposition, rather than undermining the basis for granting certiorari, admits virtually *all* of the considerations meriting this Court's review: that there is an irreconcilable circuit conflict; that the conflict is outcome determinative (as demonstrated by this very case); and that the *D'Oench* doctrine is regularly invoked in ongoing litigation.

I. THIS CASE PRESENTS A CONFLICT AMONG SIX CIRCUITS OVER THE VITALITY OF THE *D'OENCH, DUHME* DOCTRINE.

Respondent necessarily admits the clear circuit conflict over the validity of the *D'Oench* doctrine. BIO 2-3. As the Petition explains, the Eleventh Circuit's precedent applying the doctrine in the circumstances of this case is consistent with that of the Fourth Circuit, but has been flatly rejected by the D.C., Third, Eighth, and Ninth Circuits. Pet. 8-9.[1] Not only has the Eleventh Circuit expressly acknowledged and rejected the contrary view of its sister circuits in this and other decisions, Pet. 8, but – demonstrating beyond peradventure that the conflict is outcome determinative and that this case is the perfect vehicle to resolve the issue – the D.C. Circuit previously held *in this case* that the *D'Oench* doctrine is no longer valid, Pet. App. C13. The conflict thus is entrenched and cannot be resolved without this Court's intervention; Respondent does not claim to the contrary.[2]

[1] And while the First Circuit has yet to take sides in the split, the Supreme Court of Massachusetts continues to apply the federal *D'Oench* doctrine in favor of the FDIC and its assignees. *Federal Fin. Co.* v. *Savage*, 730 N.E.2d 853, 858 (Mass. 2000). Because Boston is a major city and financial center, the view of the state courts will control many suits involving assignees, which must be brought in state court if there is no diversity.

[2] Respondent's bizarre claim, BIO 12-13 n. 4, that it was not necessary for the D.C. Circuit to reach the *D'Oench* issue ignores that court's opinion and FIRREA. Noting that 12 U.S.C. § 1821(d)(9) incorporates § 1823(e), and the latter section's supposed requirement that "the agreement forming the basis of a defense or claim concern an identified 'asset acquired by' the FDIC," Respondent claims that *the FDIC* should have prevailed under § 1821(d)(9) because Murphy's claim did *not* involve a specific asset. Respondent is confused. First, the D.C. Circuit addressed and rejected the statutory defense based on both § 1821(d)(9) and § 1823(e), making it necessary for the court to address the FDIC's common-law *D'Oench* defense. Pet. App. C4-7. Second, while Respondent is correct that § 1821(d)(9) incorporates the "asset" requirement of § 1823(e), Respondent has that requirement backwards. That an agreement relate to a specific asset is a prerequisite *for the FDIC to invoke its statutory bar*, not a prerequisite for a private party to raise the agreement against the receivership. Pet. App. C5.

Nor does Respondent even discuss the grave implications that such a conflict has in the area of banking, in which sophisticated parties regularly engage in interstate transactions. Pet. 16-17. The conflict is the purest invitation to forum shopping. The FDIC, which serves as the initial receiver for failed banks, is amenable under 12 U.S.C. § 1821(d)(6)(A) to suit in the D.C. Circuit, which rejects the *D'Oench* doctrine. By contrast, almost all of the banks, successor receivers, and potential private plaintiffs, are located in other jurisdictions, creating a substantial incentive for parties to race to court in a favorable forum.[3] Even once suit has been filed, parties will seek transfer or, in a scenario that might seem implausible had it not occurred in this case, district judges might *sua sponte* transfer matters to other fora that apply the rule they seem to favor.[4]

II. THE QUESTION PRESENTED BY THIS CASE HAS SUBSTANTIAL CONTINUING IMPORTANCE.

Respondent's only real argument against granting certiorari is that the question presented supposedly lacks continuing significance. Respondent relies on a policy statement, fully addressed by the Petition, asserting that the FDIC generally will not invoke the *D'Oench* doctrine as to transactions postdating the enactment of FIRREA. BIO 9-10; Pet. 11-15.

[3] In particular, the two leading banking centers in the southern United States – Atlanta, Georgia, and Charlotte, North Carolina – are located in the Fourth and Eleventh Circuits, both of which hold that the *D'Oench* doctrine retains its vitality.

[4] Respondent's argument that this case "should have been before a district court within the jurisdiction of the Eleventh Circuit in the first instance," BIO 3 n. 1, rings a little hollow: if that were true, it seems likely that the D.C. District Court would have transferred *before* entering the dismissal that was subsequently reversed or that, at the least, the *defendant* would have requested the transfer.

There is, of course, serious doubt that the FDIC consistently follows this policy. Pet. 15 & n. 11.[5] But even if it did, there are to this day numerous cases arising from pre-FIRREA transactions. *See* Pet. 13-15; *see also FDIC* v. *Kooyomjian*, 220 F.3d 10, 12-13 (CA1 2000) (FDIC invoking both *D'Oench* and § 1823(e) as to 1987 facts); *Federal Fin. Co.* v. *Savage*, 730 N.E.2d 853, 855 (Mass. 2000) (successor to FDIC successfully invoking *D'Oench* as to alleged 1985 modification of 1984 loan guarantee).

The many current and inevitable future cases involving pre-1989 facts are not surprising given the long statute of limitations for such cases and given that claims involving long-term banking contracts such as mortgages or loan guarantees may not arise for *decades*. *Cf. Savage*, 730 N.E.2d at 855 (2000 case involving 1984 guaranty that "covered all present and future indebtedness to the bank on the part of [the borrower] and provided that the terms of the guaranty would

[5] Respondent claims, BIO 10 n. 2, that *In Re Boone (Boone v. FDIC)*, 235 B.R. 828 (D.S.C. Bankr. 1998), is "no indicium of the FDIC's" behavior because the court treated *D'Oench* and the statute as co-extensive and ultimately rejected the FDIC's position. A candid description of that case, however, would have added that the FDIC seems to have asserted *only* the common-law doctrine as the basis of its objection. 235 B.R. at 835 ("During the trial, the FDIC objected to the introduction of the August 4, 1993 letter from the FDIC and any testimony from Ms. Boone about the balance of the debt based upon the *D'Oench Duhme* doctrine."). The court's passing *dictum* that the common law had "in essence has been codified" by FIRREA, *id.*, is hardly relevant given that the court rejected the far broader *D'Oench* doctrine on the merits. And what remains significant is the FDIC's behavior – which was to assert the *D'Oench* doctrine in disregard of its supposed "policy." As for Respondent's citation to *Point Developers, Inc.* v. *FDIC*, 961 F. Supp. 449, 458 (E.D.N.Y. 1997), this single example of the FDIC following its claimed policy hardly overcomes the many other cases where it ignored that toothless policy. *See, e.g.*, Pet. 15 n. 11; *cf. FDIC* v. *Kooyomjian*, 220 F.3d 10, 13, 15 (CA1 2000) (FDIC invoking, as to pre-FIRREA facts, both *D'Oench* and § 1823(e) – the latter in violation of its policy statement – and succeeding on the purportedly inapplicable § 1823(e)).

remain in effect unless terminated in writing"). With cases from the early 1980s still winding through the system, this Court can expect an absolute *minimum* of five more years of cases unaffected by the FDIC's policy statement.

But even more fundamentally, Respondent concedes that the *D'Oench* issue will continue to arise indefinitely even as to post-1989 facts because, "[t]o be sure, successors, transferees, and assignees of the FDIC (and its predecessors) have been permitted to invoke the *D'Oench* doctrine in the FDIC's stead." BIO 11 (collecting cases from several circuits). The FDIC's policy simply does not apply to those private parties and has absolutely no bearing on the continuing significance of cases such as presented in the current Petition.

Ignoring the raft of cases from the past two years alone cited in the Petition, Pet. 13, Respondent simply asserts that the class of cases involving successors-in-interest is "minuscule, if not virtually non-existent." BIO 14. We assume that if Respondent had *any* support *at all* for that assertion – on which his entire opposition turns – he would have offered it. But Respondent's claim is made from whole cloth and is demonstrably wrong. This case is the perfect example: the FDIC was the initial receiver, but Respondent now stands in its shoes, having paid no regard at all to the FDIC's policy. The indistinguishable cases cited in the Petition, as well as the additional cases cited by Respondent himself, BIO 11, demonstrate that the current case is hardly alone in its class. That such cases are common is not surprising: the FDIC routinely sells the assets (sometimes combined with certain liabilities) of failed banks or appoints a private substitute receiver if a bank regains its financial footing. Private parties thus will continue to invoke *D'Oench* in cases arising *indefinitely* into the future, in addition to the great many cases now pending that are the legacy of the savings and loan debacle.[6]

[6] The many cases cited in the Petition were not remotely a complete compendium of the cases involving successors and assigns. Many more exist,

The fact that private parties can and regularly do invoke the *D'Oench* doctrine is a principal reason why Respondent is wrong when it relies upon the denial of certiorari in *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (CA11 1997) (*en banc*), *cert. denied sub nom. Hess* v. *FDIC*, 523 U.S. 1093 (1998). The respondent in that case was the FDIC, not a private successor receiver, and the FDIC explained in its brief in opposition that *it* would no longer invoke the *D'Oench* doctrine. *See* Pet. at 11-12. And while in retrospect the FDIC's claim now seems questionable, at the time there was at least some question about the issue's continuing significance in those cases *as to the FDIC*. Aside from cases involving the FDIC, this Court appears not to have considered that private successors could or would invoke the *D'Oench* doctrine, as the Solicitor General did not bring that fact to the Court's attention.[7] It thus is not surprising that the Court denied certiorari at that time given the lack of any indication that its decision would have substantial continuing significance.

More fundamentally, Respondent's suggestion that the denial of certiorari in a prior case somehow precludes or counsels against review in a subsequent case is mistaken. The Court regularly denies certiorari when there is a realistic prospect that a circuit conflict will resolve itself, particularly as a result of recent Supreme Court decisions. As the Petition

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and they continue to arise. *See, e.g.*, *Savage*, 730 N.E.2d at 855 (successor-in-interest to FDIC invoking *D'Oench*). Furthermore, the reported cases involving *D'Oench* are just the tip of the iceberg. Most controversies settle, either before trial or otherwise without a published opinion. In circuits where *D'Oench* is still applied, settlements will reflect the legal landscape, causing numerous controversies and millions of dollars to be affected without ever generating court opinions.

[7] If our understanding of the context and briefing of the prior petition were incorrect, we fully expect that the Solicitor General, who was served with a copy of the Petition, would have filed a brief in this case on behalf of the FDIC, which was the original defendant in the D.C. District and the appellant in the D.C. Circuit. Pet. at 12 n. 8.

explained and Respondent does not dispute, that was the case with respect to the denial of certiorari in *Motorcity II*, which followed on the heels of this Court's decision in *Atherton* v. *FDIC*, 519 U.S. 213 (1997). Pet. 11-12. When, as here, there no longer is any prospect that the conflict can otherwise be resolved, the Court grants certiorari. *E.g.*, *Central Green Co.* v. *United States*, No. 99-859, *cert. granted* -- U.S. --, 120 S. Ct. 1416 (2000) (certiorari granted despite several recent denials on scope of immunity under Flood Control Act of 1928); *Balar* v. *United States*, No. 98-1667, *cert. granted* -- U.S. --, 120 S. Ct. 10 (1999) (certiorari granted despite recent denial on effect of tax statute of limitations).

Furthermore, Respondent's concession that the *D'Oench* doctrine is disparately invoked by private parties and the FDIC substantially *buttresses* the urgent need for review in this case. This Court grants certiorari to resolve circuit conflicts because federal law should be uniform and should not produce varying results. Not only is there such a conflict here, but under the current state of the law, there can be different results in the *same* circuit and even in the *same* case depending on whether and when a private successor-in-interest is substituted for the FDIC. Here, for example, Respondent's position suggests that if he had not been named as successor, the FDIC would *not* have asserted the *D'Oench* doctrine as to those agreements made post-FIRREA and that the result in the Eleventh Circuit would have been different. The irony of that point is particularly bitter, given that the doctrine was *not* intended to benefit private successors such as Respondent but instead, as the BIO itself explains, "was intended *to protect the FDIC 'and the public funds which it administers* against misrepresentations as to the securities or other assets in the portfolios of the banks.'" BIO 4 (quoting *D'Oench*, 315 U.S. at 457) (emphasis added).

Respondent's only remaining argument – that this Court should await the development of an as-yet-non-existent circuit conflict over whether successors may invoke the

D'Oench doctrine – makes no sense. Although Respondent's argument is correct insofar as it implies that private successors ought not be able to invoke *D'Oench* in any event, the lower courts have yet to take up that view, much less split over the issue. Indeed, Respondent does not cite a single case holding that a successor may not invoke the otherwise-available *D'Oench* doctrine. Furthermore, even accepting that courts *ought* to deny successors the benefit of the *D'Oench* doctrine, and hence that Respondent should have lost this case for more than one reason, such further defect in Respondent's defense is hardly a basis for this Court to deny review. If this Court waited for non-existent future splits to moot existing and entrenched splits, federal law would be confused indeed.[8] Not surprisingly, the existence of a present split has long been one of the primary reasons this Court grants certiorari, notwithstanding mere speculation as to future legal developments.

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *O'MELVENY* AND *ATHERTON*.

Respondent is wrong to assert that certiorari should be denied because the judgment below supposedly is correct. Quoting the Eleventh Circuit, Respondent maintains that *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* do not "'address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine.'" BIO 8. That is simply not true, as Petitioner has already explained, Pet. at 10, and Respondent chooses to ignore. *Atherton* expressly found that a con-

[8] The suggestion to wait for other courts to reject a successor's right to invoke *D'Oench* – and presumably thus moot the existing split – is especially disingenuous given that Respondent has taken precisely the opposite position and claimed entitlement to the *D'Oench* doctrine notwithstanding that it is a mere successor.

gressional enactment had abrogated "a pre-existing judge-made federal common-law standard." 519 U.S. at 225, *quoted in* Pet. 10. And both *Atherton* and *O'Melveny* relied upon the Court's earlier decision in *Milwaukee* v. *Illinois*, which held that "when Congress addresses a question *previously governed by a decision rested on federal common law* the need for such an unusual exercise of law-making by federal courts disappears. . . . [The Court's] commitment to the separation of powers is too fundamental to continue to rely on federal common law . . . when Congress has addressed the problem." 451 U.S. 304, 314-15 (1981) (emphasis added), *quoted in* Pet. 10-11 n. 6.

But Respondent is correct in one important respect: the Eleventh Circuit (joined by the Fourth) holds that this Court's leading modern decisions on the scope of federal common law – *O'Melveny* and *Atherton* – are inapposite to congressional enactments said to supplant pre-existing common law rules. The D.C. Circuit (joined by the Third, Eighth, and Ninth Circuits) holds squarely to the contrary. That fundamental disagreement on the scope of federal common law – premised on a perceived inconsistency between *United States* v. *Texas*, 507 U.S. 529 (1993), and *Milwaukee* v. *Illinois* – itself presents a circuit conflict that, because it encompasses *all* federal common-law doctrines, is of indisputable continuing significance and therefore buttresses the case for granting certiorari.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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Dated: September 6, 2000.

(6)

Supreme Court, U.S.
FILED
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CLERK

No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 5, 2000
CERTIORARI GRANTED SEPTEMBER 26, 2000

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ELEVENTH CIRCUIT OPINION ..... PET. APP. A1-A18

RELEVANT DOCKET ENTRIES

No. 96-cv-2614

U.S. District Court for the Southern District of Florida

No.	Date	Item
1	9/16/96	ORDER TRANSFERRING CASE from District of Columbia.
16	5/7/98	MOTION by Federal Deposit to substitute party defendant.
17	5/11/98	ORDER granting [16-1] motion to substitute party defendant; Jeffey [sic] Beck is substituted as the party defendant.
26	7/27/98	ORDER granting defendant's motion to dismiss [filed in USDC District of Columbia] dismissing case.
29	8/21/98	NOTICE OF APPEAL by Bruce G. Murphy of [26-2] order.

AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE G. MURPHY, pro se,
265 Llwyd's Lane
Vero Beach, Florida 32963-3252
(561) 231-4202

Plaintiff,

v. Civil Action No. 92 1924

FEDERAL DEPOSIT.INSURANCE
CORPORATION, as Receiver for
Southeast Bank, N.A.

Defendant.

AMENDED COMPLAINT

1. This is a civil action brought against the Federal Deposit Insurance Corporation, as receiver (in the possession of a substantial surplus) for Southeast Bank, N.A., and the jurisdiction of this court is founded on 12 U.S.C. § 1819, 15 U.S.C. § 77v, 15 U.S.C. § 78aa, 18 U.S.C.A. § 1965, 28 U.S.C. § 1331, and 28 U.S.C. § 1361.

2. Venue is properly in this judicial district pursuant to 12 U.S.C. § 1821 (d) (6) (A).

3. Plaintiff ("Murphy") is a citizen of the County of Indian River, State of Florida.

4. Defendant Federal Deposit Insurance Corporation ("FDIC") is an agency of the United States Government created under and pursuant to the Federal Deposit Insurance Act

(12 U.S.C. §§ 1811 et seq.), and was and is engaged in the performance of governmental functions in the State of Florida and in Washington, D.C.

5. Southeast Bank, N.A., ("Southeast") was at times herein mentioned a duty organized and existing national banking association with its principal place of business in the City of Miami, County of Dade, State of Florida.

6. On September 19, 1991, the Office of the Comptroller of the Currency declared Southeast insolvent and appointed the FDIC receiver of Southeast.

7. In 1989,. Murphy invested the sum of $515,672.37 in, and became a limited partner in, Orchid Island Associates Limited Partnership ("Orchid").

8. Orchid was the developer of the Orchid Island Golf and Beach Club project ("the Project") located in the Town of Orchid in Indian County, Florida, near Vero Beach. The Project features a golf club, beach club and numerous other amenities along with a variety of luxury residences. The General Partners of Orchid are Robert H. Haines III ("Haines") and Richard-Roberts Co., Inc. ("RR Co."). [Haines and RR Co. are sometimes hereinafter collectively referred to as the General Partners.] As will be set forth hereinafter, by virtue of its actions and involvement with respect to the Project, Southeast became a de facto partner of and joint venturer with Haines and RR Co.

9. Southeast was the acquisition, development and construction lender for the Project. Orchid accepted loans from Southeast to finance the acquisition, development and construction of the Project on or about August 30, 1988, January 26, 1989, April13, 1989, and January 31, 1990, totaling approximately $50 million, which loans are evidenced by loan documents.

10. One of the loans was established as a construction "revolver" which had a cap and was designed such that a portion of revenues from sales would be applied to reduce the

amount outstanding and enable the loan to remain below the cap.

11. Throughout the development and construction process, Southeast, Haines, and RR Co., engaged in fraudulent and wrongful activities which caused great injury, damage, and harm to Murphy.

12. The first phase of the fraud and other wrongdoing that injured Murphy induced Murphy to make his $515,672.37 investment in Orchid.

13. On June 14, 1989, Haines wrote a solicitation letter to Murphy in Virginia. The letter stated that the enclosed projections were prepared by Arthur Andersen & Co. The projections promised a 6.1 multiple return on the investment. The solicitation letter was also accompanied by an offering memorandum outlining an investment offering of Orchid.

14. In making the 6.1 multiple return projection, the solicitation letter falsely implied that there was information that supported the projection, and that Arthur Andersen & Co. had prepared the projection.

15. In fact, unbeknownst to Murphy, there was no such basis for the projection and the projection was entirely speculative, groundless, and contrary to the information then available.

16. Unbeknownst to Murphy, Arthur Andersen Co. had not prepared the projection.

17. The offering memorandum contained a subscription agreement. Paragraph 11 of the subscription agreement provided in part that "It never has been represented, guaranteed, or warranted to me by any representatives of the General Partners, their agents or employees, or any other person, expressly or by implication, as to any of the following:...ii THE PERCENTAGE OF PROFIT AND/OR AMOUNT AND/OR TYPE OF CONSIDERATION, PROFIT OR LOSS...TO BE REALIZED, IF ANY, AS A RESULT OF THIS VENTURE."

18. The contents of Paragraph 11 of the subscription agreement were false in that Haines, a General Partner, had made representations regarding the profit to be realized from the venture.

19. Paragraph 11 was included in the subscription agreement as part of the scheme to defraud in that Paragraph 11 created a sham basis for attempting to escape liability for the false, misleading, and misleading representations made with respect to the Project.

20. Because Paragraph 11 of the subscription agreement conflicted with the 6.1 multiple investment return shown by the projections, Murphy in Virginia placed an interstate telephone call to Anthony F. Dante III in Connecticut, the contact person named in the subscription agreement, on June 19, 1989. That call was returned by an interstate telephone call from Haines in Connecticut to Murphy in Virginia on the same day. Haines instructed Murphy to modify Paragraph 11 of the subscription agreement to reflect Murphy's reliance upon the projections, which Murphy did.

21. Justifiably relying upon the solicitation letter, the projections and Haines' assurances, on August 18, 1989, Murphy transferred the sum of $515,672.37 from one of his accounts in Virginia to William Caldwell, the attorney for Haines, in Vero Beach, Florida, pursuant to Haines' and Caldwell's directions, to fund his subscription agreement of $500,000, and certain utility fees and other costs.

22. The fraudulent representations and activities in connection with the solicitation letter and the offering memorandum were knowingly, intentionally, and/or recklessly made and undertaken, with the intention that Murphy would thereby be induced to invest in Orchid, and they in fact induced Murphy to expend $515,672.37 to invest in Orchid.

23. The benefits of the General Partner's fraud upon Murphy were received in part by Southeast. The proceeds received by Orchid for the sale of one (1) unit to Murphy

were used in part to repay to Southeast the second mortgage encumbering the Project.

24. By letter dated December 1, 1989 from Haines to Murphy in Virginia, Haines acknowledged receiving Murphy's fully executed subscription agreement and corresponding check for a full share unit.

25. Murphy learned in September, 1991 that Arthur Andersen & Co. did not prepare the projections as represented by Haines in behalf of Orchid in the solicitation letter.

26. Upon information and belief, the fraudulent solicitation letter sent by the United States mails to Murphy was also sent by United States mails to some or all of the hundreds of other potential investors. The fact that the fraudulent solicitation letter was sent to others is evidenced by Arthur Andersen & Co.'s letter of July 22, 1989 sent by United States mails which asked Haines to inform any party who received the projections and might become an investor in Orchid to be made aware that the projections were prepared by the management of Orchid and not by Arthur Andersen and Co.

27. The subscription agreement, containing the false, misleading and fraudulent paragraph 11 set forth previously, was sent by United States mails to hundreds of potential investors. Upon information and belief, some but not all of these investors received fraudulent representations regarding the projected 6.1 multiple return.

28. The subscription agreement was fraudulent both as to those potential investors who also received the fraudulent multiple return projections and as to those who did not receive the fraudulent multiple return projections. In the case of those potential investors who also received the fraudulent multiple return projections, Paragraph 11 of the subscription agreement provided a sham defense against liability for fraud. In the case of those potential investors who did not also receive the fraudulent multiple return projections, Paragraph 11 of the subscription agreement created a false and misleading

appearance that Orchid was being promoted in a lawful and legitimate manner.

29. On July 31, 1989, Haines responded by letter via United States mails to Arthur Andersen and Co.'s letter of July 22, 1989 by stating that he had taken the actions described in Arthur Andersen & Co.'s letter of July 22, 1989. In fact, neither of the General Partners nor Southeast ever informed Murphy that the projections were prepared by the management of Orchid and not by Arthur Andersen & Co.

30. Southeast knew, acted recklessly with respect to, and/or should have known of the fraudulent representations and activities set forth above. Southeast's knowledge, recklessness, and/or negligence is evidenced, for example, by the fact that by July 22, 1989, the use of the fraudulent solicitation letter was sufficiently notorious and blatant as to require Arthur Anderson & Co. to formally request Haines to inform anyone who received the projections that Arthur Anderson & Co. did not prepare them. Yet, neither the General Partners nor Southeast took the action Arthur Andersen & Co. requested.

31. Southeast materially participated or aided in the sale of Orchid unit to Murphy and did so, upon information and belief, with knowledge of the wrongdoing of Orchid and the General Partners.

32. Southeast directly or indirectly controlled the General Partners and Orchid.

33. Throughout the development process, with control of the purse strings, Southeast gradually asserted greater and greater control over the Project and the development effort. Among other things, Southeast acted as surety on the Project subdivision improvements performance bonds, Southeast's officers required the Orchid engineer to report to it, Southeast's officers were closely involved with Orchid's employees in the budget formation process, Southeast's officers searched for a participant to complete the Marsh Island transaction,

Southeast's officers conducted monthly review of progress of the Project with its engineer, Southeast's officers responded to limited partner inquiries concerning Orchid, Southeast prepared the Plan for the Orchid Island Golf and Beach Club, Southeast encouraged lot closings prior to completion of the Project's infrastructure and amenities, Southeast became a party to the construction contract with the builder of the Beach Club and cabanas, and Southeast controlled sales prices for lots and Club equity memberships. Southeast's control of the Project further included Southeast's activities in connection with the community development district bond offering.

34. Southeast's involvement and control of the Project and of Orchid was so extensive and complete as to constitute Southeast a de facto partner, co-agent of, and joint venturer with the General Partners and Orchid. for the purposes of the activities alleged herein.

35. Southeast's domination and control of the Project, of Orchid, and of the General Partners was so extensive and complete that, under principles of partnership, joint venture and agency law, and principles of vicarious and respondeat superior liability, Southeast is responsible and liable for the wrongful actions and omissions of the General Partners set forth herein.

36. Before, during, and after the time of Murphy's investment in Orchid, the General Partners have breached their fiduciary obligations to Murphy by engaging in fraud, nondisclosure fraud, constructive fraud, violations of partnership documents, and mismanagement of Orchid.

37. Before, during, and after the time of Murphy's investment in Orchid, Southeast has materially participated in or aided violations of the fiduciary obligations owed to Murphy and has done so, upon information and belief, with knowledge of the wrongdoing of the General Partners.

38. Although sales at the Project began well, eventually sales slowed, and it became necessary for the General Partners, aided by Southeast, to continue and augment their fraudulent and wrongful activities.

39. In order to protect its de facto ownership position and substantial investment in the Project, Southeast deemed it imperative that potential investors and investors not gain access to full and accurate information regarding the past, current, and future condition of the Project.

40. Therefore, Southeast, in order to protect its own investment in the Project, aided, abetted, and participated in .breaches of fiduciary obligations owed to the limited partners by continuing to underwrite and promote the Project and by providing extensive assistance to the General Partners despite Southeast's general awareness of the activities of the General Partners constituting nondisclosure fraud, constructive fraud, violations of partnership documents, and mismanagement of Orchid by the General Partners.

.41. The wrongdoing of the General Partners from about 1988 until about July 1, 1991, have included without limitation wrongful actions and omissions by which Haines and RR Co. have

A. Installed one of Haines' sons, Robert H. Haines IV ("Hutch") as Mayor of the Town of Orchid, then a town having only four developer-related residents, three living in trailers, at a salary of approximately $25,000 a year plus automobile expenses and at the same time allowed Hutch to be a salesman at the Project;

B. Hired an excessive number of employees under the circumstances, many at high salaries, without any regard for reasonable necessity or performance;

C. Failed to timely comply with repayments to Southeast causing Orchid to convey four (4) building lots to Southeast. This conveyance was done under the false and fraudulent pretext that it was a lawful exercise of lender

rights, but in fact Southeast itself had wrongfully contributed to Orchid's problems and had no lawful right to require or accept conveyance of the four lots. In taking these four lots, Southeast misappropriated over $800,000 worth of property as a payoff for its willingness to continue to provide support and assistance to the General Partners despite their continuing wrongdoing.

D. Allowed certain limited partners to execute non-interest bearing promissory notes to Orchid evidencing their obligation for capital contributions subsequent to their initial cash contributions;

E. Allowed Haines and his wife during 1989 to jointly purchase a building lot from Orchid and in connection therewith to execute a note payable to Orchid in the amount of $216,207 bearing only eight (8%) percent interest thereon at a time when Orchid was paying to Southeast prime plus one and one half (1 1/2%) percent, which sum of interest totalled more than eight (8%) percent at all times. It is not known at this time whether Haines and his wife ever repaid the principal or the interest to Orchid.

F. Allowed Haines to owe Orchid an additional $53,793 in connection with the purchase of the building lot without any interest thereon;

G. Caused, as of December 31, 1989, Orchid to pay RR Co. $2,390,323 classified as prepaid (emphasis added) asset management and development fees over and above the sum of $1,512,500 for the year ended December 31, 1989, that Orchid paid RR Co. as an asset management fee. This fee was paid under the false and misleading pretext that it was bona fide, reasonable, legitimate, any customary, when in fact it was excessive, unreasonable, illegitimate, and extraordinary. The General Partners and Southeast wrongfully failed to disclose to Murphy and the

other limited partners to disclose all material facts regarding this fee.

H. Caused a false and misleading appraisal to be generated and used in 1989 valuing the land at $60.5 million when the land had just been purchased the year before for approximately $32,000,000. According to tax records of the Town of Orchid, the taxable value of property in Orchid was only $24,672,000 in 1990, one year after the 1989 inflated appraisal. Moreover, according to the same records, the taxable value of property in Orchid in 1991 was only $49,856,000, still far short of the $60.5 million value claimed in the 1989 appraisal. Among the reasons for generating the inflated land value were 1) it enabled the General Partners and Southeast to create the false and misleading appearance that the Project was solvent and was being properly managed, thereby enabling the General Partners to continue their wrongful activities, 2) using an falsely inflated land value enabled the General Partners to falsely and fraudulently increase their annual management fee, which was two and one half (2 1/2%) percent of the value of the assets of Orchid. The 2 1/2% annual fees was already above the norm in the industry, and unconscionable as well, due to mismanagement of the Project by the General Partners. The excessive fee was further compounded by the fraudulently inflated amount produced by the erroneous appraisal. In addition to the asset management fees, the General Partners have also taken exorbitant development fees, i.e., $1,329,236 for the year ended December 31, 1989. In fact, the General Partners did nothing to earn these development fees, as the development of the Project had been handled by James Anthony, Robert Briggs and Mason Delafield who were paid by Orchid. Further, according to the Private Placement Memorandum, Orchid Island Development Company, not the General Partners, are allowed to take a development fee. The amount of the fee, 8% of total construction costs,

is above the industry standard. The General Partners and Southeast wrongfully failed to disclose to Murphy and the other limited partners all material facts regarding the appraisal, the management fees, and the development fees;

I. Allowed exorbitant syndication costs of $2,775,000 through December 31, 1989, most of which was paid to RR Co.;

J. Caused Orchid to pay RR Co. $1,225,000 and' $50,000 in selling commissions during 1989 and 1988, respectively;

K. Caused Orchid to pay a $1,427,422 premium on April 19, 1989, in connection with Orchid redeeming certain limited partner capital contributions converted in 1988;

L. Required Orchid to pay to RR Co. preferred distributions of $291,000 during 1989 for the period of January 1, 1989 through April 19, 1989. Preferred distributions of $303,176 accrued as of December 31, 1988 were also paid to RR Co. during 1989;

M. Distributed $500,000 during 1989 to a certain limited partner in redemption of that partner's interest in Orchid. No such favored treatment was offered or given to any of the other limited partners. In connection with that transaction, the General Partners elected to increased the basis of Orchid's property by the difference between the limited partner's capital account balance of $416,893 and the $500,00 cash distribution;

N. Paid $993,750 of selling commissions during 1989 to Orchid Island Real Estate Company, Inc. Haines and/or RR Co. own all, or a portion, of Orchid Island Real Estate Company, Inc.;

O. Permitted Haines to charge his condo expenses of $15,702 during 1989 in Vero Beach to Orchid;

P. Paid, on information and belief, hidden somewhere in the financial statements, the costs of owning, operating and maintaining Haines yacht, "Don Quixote", as well as paying its captain and crew; and as well as paying Haines' expenses and costs in connection with Haines' John's Island Club membership;

Q. Failed to render to Orchid timely quarterly financial reports, annual audited reports and K-l's;

R. Paid and lost $50,000 option money belonging to Orchid in connection with Haines' aborted effort to purchase Marsh Island. Further, Haines, in the Marsh Island matter, attempted to charge Orchid a $700,000 commission to be paid to Haines and/or one of his affiliates by Orchid as buyer when it is usual and customary to have the seller pay such a commission;

S. Failed to disclose that in 1989, six (6) New England banks wrote off loans of $2 million apiece to RR Co., or one of its affiliates, with no return on the dollar;

T. Forecasted profit during the marketing of this partnership at six (6) times return of the investment, including a lot, and in April, 1991, reduced the profit forecast to two (2) times the investment, including a lot;

U. Allowed the General Partners to be in violation of Orchid agreement by failing either to infuse Orchid with $10,000,000 or to reduce their stake in Orchid through the sale of additional equity units. Haines has said that he would like to leave $7,000,000 of second mortgage debt in place, leaving him with a larger equity stake and leaving the $7,000,000 debt ahead of the limited partners' equity. The General Partners have failed to reduce or subordinate their fees in light of the reduced profit potential and the extra interest that Orchid is being forced to pay. The excess interest should further offset the General Partners' fees;

V. Failed to subordinate the General Partners' fees to the paydown of the Southeast acquisition and development loan until sometime in the spring of 1991;

W. Used partnership funds to hire the law firm of Beigle & Sandler as a Law firm to defend Haines, rather than as a law firm to protect the interests of the equity partners;

X. Allowed Orchid to pay for the filling, sodding, and irrigation system and watering of Lot 53 which was personally owned by Haines' son, Hutch;

Y. Allowed fill, the transportation thereof having been charged to Orchid, to be deposited on the lot owned by the Smith brothers, long-time friends and business associates of Haines;

Z. Allowed special free memberships without the payment of initiation fees or annual dues to the Orchid Island Gold and Beach Club for certain favored insiders, friends and associates, as well as to his friend and business associate, Robert Foisie, who is neither a lot owner nor a limited partner, as well as allowed other insiders to give to others free membership to the club without the payment of initiation fees or annual dues. Furthermore, Haines allowed his good friends and business associates, the Smith brothers, to have two (2) club memberships and/or club charging privileges when they received only one (1) lot, entitling them to only one membership;

AA. Permitted Haines's son, Hutch, to entertain his young friends, who were not bona fide prospects, for golf and for meals and drinks at the beach club at the expense of Orchid, as well as other insiders, their wives and their guests the same privileges at the expense of Orchid. Further, Hutch, who is not a paid member of the club, played golf regularly at the club, without paying any cart fees. Furthermore, Hutch lived rem fee at the Project from 1989 through part of 1991;

AB. Taken an unsecured note from an insider, Mason Delafield, in connection with the purchase of a lot;

AC. Given approximately a $90,000 discount on a lot sold to Robert Briggs, an insider;

AD. Allowed excessive cost over-runs on the Project and generally mismanaged the Project;

AE. Allowed the Southeast Bank loan to be in default as of June 1, 1991, and failed to date to cure that default;

AF. Engaged in conduct and activities calculated to erode or eliminate the equity investments of Murphy in the Project, as well as about forty (40) other limited partners, said investments totalling about $15 million dollars, or more; and

AG. Paid the former chief salesman of the Project, Mason Delafield, a salary of $200,000 per year, plus automobile allowance, without any regard for sales performance.

42. Despite Southeast's general awareness of many or all of the foregoing wrongful activities, Southeast failed to make full disclosure of all material facts to Murphy and the other limited partners and instead participated in and aided the wrongdoing of the General Partners by continuing to finance the Project and to fund the wrongful activities of the General Partners.

43. Southeast wrongfully benefited from the wrongdoing of the General Partners in that Southeast's received funds from the Project which it would not have received but for the wrongdoing activities of the General Partners.

44. Murphy's fraudulently procured investment in Orchid and in the Project, his false impression that Orchid and the Project were and remained viable, his continuing lack of knowledge about the wrongdoing perpetrated against him, and the injuries suffered by Murphy, were proximate results

of Southeast's aiding, abetting and participation in the wrongdoing set forth above.

45. In 1991, revenue from sales of lots and Club memberships became insufficient to meet Orchid's repayment obligations under the loan documents and to reduce the construction revolver loan. In response, Southeast acting as a partner, co-agent, and joint venturer of and with Orchid's General Partners assumed the obligation to act as agent and fiduciary for Orchid Island and its general and limited partners in establishing a Community Development District and orchestrating a public bond offering to raise funds for the development, which funds would be used to satisfy the indebtedness to Southeast and secure additional necessary funding for the completion of the project.

46. Southeast acted as agent of and fiduciary for Orchid and its general and limited partners by taking actions to determine the feasibility of the bond offering, choosing bond counsel, participating in and/or drafting the Master Trust indenture for the Orchid Island Community Development District, selecting the engineer, town council, and consultant and installing itself as part of the Town of Orchid Special Assessment Financing Group.

47. Southeast's conduct constituted total dominion over the development such as to deprive Orchid of its own will, rendered Orchid subservient to the interests and directions of Southeast, and established an independent legal obligation owed by Southeast to Orchid and Murphy arising separate and apart from the loan documents.

48. Southeast assumed the role and duties of a fiduciary of and agent for Orchid, and its general and limited partners, including Murphy, and additionally owed a duty of reasonable care to them.

49. Under the bond financing scheme devised by Southeast, Orchid would establish a community development district and engage in a public bond offering to raise funds. As

designed by Southeast, Orchid would take a "bridge" loan from Southeast, and various of the principals of Orchid would similarly take additional loans from Southeast, to carry the Project until the bond offering was complete. The proceeds from the bond offering, according to Southeast, would not only repay each of these loans but would be applied to reduce the outstanding balance with Southeast. In addition, Southeast repeatedly represented to Orchid and its general and limited partners that if Orchid undertook the bond financing, Southeast would add $4 million to Orchid's construction revolver loan, funds which Southeast knew Orchid desperately needed to complete the construction of the Project's infrastructure and amenities.

50. Having devised this plan, Southeast then controlled its implementation. Southeast's corporate finance department performed all the necessary calculations and feasibility studies, and Southeast retained the underwriters and arranged for bond counsel. In less than three months time, all arrangements were complete, investors had been lined up and the offering was set to occur.

51. In the course of its bond financing activities, Southeast expressly and/or impliedly represented to Orchid and its general and limited partners that the bond financing scheme devised by Southeast was a viable financing arrangement and that Southeast had made all the necessary arrangements to render such financing feasible.

52. Upon information and belief, Southeast repeatedly caused the United States mails to be used in furtherance of its false, misleading, and fraudulent bond financing scheme.

53. On the eve of the offering, Southeast announced for the first time that it needed to discuss the bond transaction with the several lenders who had collectively participated in the Orchid loans, and to obtain their approval. As structured, the bond financing would have resulted in a lien on the Project superior to that of the participants, at which the latter re-

jected the bond offering. Southeast then called a halt to the entire transaction.

54. At no time prior to Southeast's termination of the bond financing scheme did Southeast disclose to Orchid and its general and limited partners that the bond transaction required the approval of several other lenders, and this requirement was contrary to the representations and assurances that Southeast expressly and/or impliedly made to Orchid and its general and limited partners.

55. As a direct result of Southeast's involvement in soliciting community development district participants on behalf of Orchid and conducting a public bond offering, and as a direct result of the false, misleading, and fraudulent representations and assurances of Southeast, Orchid and its general and limited partners imposed trust and confidence in Southeast, relied on the actions and representations of Southeast, and forebore from refinancing or seeking additional financing for the project, all to the great injury and determine of Orchid and its general and limited partners.

56. Southeast knew, at the time it devised the community development district bond offering plan, that its participants' awareness and approval of the proposed bond offering was required, but failed to disclose this requirement to Orchid and its general and limited partners. Instead, Southeast induced Orchid and its general and limited partners to take an additional loan in connection with the bond offering by representing to them that the proceeds of the offering would be more than sufficient to repay not only that loan but a portion of the previous indebtedness and by assuring them of an increase in Orchid's construction revolver account. These omissions and representations were material to the decision of Orchid and its general and limited partners to take the additional loan and expend other resources in connection with the bond offering, and were material to the decision of the general and limited partners to forebear from obtaining other financing.

57. Southeast's failure to inform Orchid and its general and limited partners, including Murphy, of the requirement of the participants' approval, and Southeast's representations as to the benefits of the bond offering, were false when made, were known to Southeast to be false and were made by Southeast with the intention of inducing Orchid and its general and limited partners to undertake the additional loan and to forebear from obtaining other financing.

58. Orchid and its general and limited partners reasonably relied upon Southeast's omissions and misrepresentation by taking the additional loan, by expending additional resources in connection with the bond offering, and by forebearing from obtaining other financing.

59. The scuttled bond offering undermined the economic viability of the Project. Having taken additional loans and expended resources in reliance up on Southeast's assurances regarding the bond financing proceeds and construction revolver increase, and receiving absolutely nothing in return, Orchid's position deteriorates. Ten days after undermining the financing effort it had devised and implemented, Southeast turned around and placed Orchid in default under its various loan and security documents.

60. On August 2, 1991, Southeast filed an action to foreclose the acquisition and development mortgages on the real property, fixtures and improvements of the Project, and to exercise the rights of a secured party under pledge agreements and security instruments in intangible and tangible personal properties. Murphy's investment in Orchid is now worthless.

61. On or about September 19, 1991, Southeast was declared insolvent and taken over by the FDIC as Receiver. The FDIC then sold the Southeast loans on the project to First Union National Bank of Florida, N.A. ("First Union").

62. On or about May 27, 1993, First Union sold the project at a foreclosure sale.

63. The FDIC, as Receiver for Southeast, is in possession of a large surplus.

64. At all relevant times herein, on information and belief, Southeast failed to require Orchid and the General Partners to submit to Southeast regular and timely detailed financial statements and reports or Orchid, failed to audit the books of Orchid, failed to follow the terms and condition of the loan documents, failed to properly monitor, fully discover and correct the conduct and activities of the General Partners outlined in this Complaint, failed to keep the participating banks and participant USX Corporation advised of the fact and status of the bond proposal by the Town of Orchid to create a special taxing district to make assessments for the completion of the infrastructure of the Project and thus causing the bond proposal to fail and in turn causing the Project to fail, and on information and belief, Southeast has exceeded its legal lending limits in connection with the Project, failed to properly apply the loan proceeds and otherwise negligently administered the loan, all of which caused Murphy to lose his investment.

65. Because Southeast devised the bond financing scheme, determined its feasibility, performed the necessary calculations and undertook its implementation, Southeast's obligations to Orchid with respect to such financing were memorialized in substantial documentation from Orchid and letters from Orchid's counsel alerting Southeast to its failed responsibilities in connection with the bond offering. All such documentation, and Orchid's claims based upon Southeast's misconduct, were thus readily apparent on the face of Southeast's files and were manifested to the Federal Deposit Insurance Corporation prior to the takeover of Southeast.

66. In December, 1991, Murphy duly and timely filed a proof of claim in the sum of $602,031.54 with the FDIC.

67. On June 23, 1992, the FDIC determined that Murphy's claim should be entirely disallowed, as evidenced by Exhibit A.

68. To date, Murphy has received no return on his investment in Orchid and has received no part of the capital he invested in Orchid.

COUNT I
(DECLARATORY RELIEF)

69. Murphy repeats and realleges Paragraphs 1 through 68 above as if fully set forth herein and further states as follows.

70. As of June 23, 1992, the FDIC did not agree to the review of its determination in an administrative hearing pursuant to 12 U.S.C. § 1821(d) (7)(A).

71. As of June 23, 1992, the FDIC has failed to establish other alternative dispute resolution procedures as required by 12 U.S.C. § 1821(d)(7)(b).

72. There is an actual controversy between Murphy and the FDIC regarding the FDIC's failure to establish other review resolution procedures and Murphy is entitled to a declaratory judgment declaring that the FDIC must forthwith establish other alternative dispute resolution procedures, and offer the same to Murphy.

WHEREFORE, Murphy requests that the Court enter a declaratory judgment declaring that the FDIC shall forthwith establish other alternative dispute resolution procedures as required by 12 U.S.C. § 1821(d)(7)(B), and offer the same to Murphy, and further requests that the Court grant such other and further relief as deemed proper.

COUNT II
(MANDAMUS)

73. Murphy repeats and realleges Paragraphs 1 through 72 above as if fully set forth herein and further states as follows.

74. The FDIC has a duty to establish other alternative dispute resolution procedures pursuant to 12 U.S.C. § 1821(d)(7)(b).

75. As of June 23, 1992, the FDIC has failed to perform the aforesaid duty owed to Murphy.

WHEREFORE, Murphy requests. that the Court compel the FDIC establish alternative dispute resolution procedures within such time as may be fixed by the Court, and order the FDIC to offer such alternative dispute resolution procedures to Murphy within thirty (30) days of the establishment of such procedures.

COUNT III

(FAILURE TO REGISTER SECURITIES)

76. Murphy repeats and realleges Paragraphs 1 through 75 above as if fully set forth herein and further states as follows.

77. That partnership units in Orchid are securities for the purposes of both the Virginia Securities Act, the Florida Securities and Investor Protection Act, and the federal Securities Act of 1933 and the Securities Exchange Act of 1934, to-wit: Investment Contracts. The limited partnership interests and the acts complained of in this complaint involved the purchase and sale of securities by means of written and oral communications, by use of the mails, and by use of the means and instrumentalities of interstate commerce.

78. That partnership units in Orchid are not, and never have been, registered under the Securities Registration provisions of the Virginia Securities Act, and are not and never have been registered with the Securities and Exchange Commission as required by Section 5 of the Securities Act of 1933 and, therefore, were offered and sold by defendants in violation of Section 12(1) of the Securities Act of 1933. This is not the first time that Haines and RR Co. have violated securities laws or rules. During the offering period, both Haines and RR Co. failed to disclose to prospective purchasers of

Orchid units that on April 10, 1989, the State of Illinois issued a Notice of Hearing to determine whether an order of revocation, suspension or censure should be imposed against Richard Roberts Capital Corp., a subsidiary of RR Co. The allegations were that the respondent failed to timely file required financial documents with the Secretary of State. A hearing date was set for June 28, 1989; docket/Case No. H8900238, dated March 29, 1989. On May 23, 1989, by means of a stipulation, Illinois entered into a Consent Order against Richard Roberts Capital Corp. The findings of fact and conclusions of law were that respondent failed to timely file a required financial document with the Secretary of State thereby violating § 12.D of the Illinois Securities Law of 1953, as amended. A fine of $500 was assessed against the respondent.

79. As a result, Murphy has suffered hundreds of thousand of dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for rescission and/or damages, including attorneys' fees, interest, costs and such other and further relief as the Court deems just and proper.

COUNT IV

(UNLAWFUL OFFER AND SALE OF SECURITIES

80. Murphy repeats and realleges Paragraphs 1 through 79 above as if fully set forth herein and further states as follows.

81. The solicitation letter and the projections used by Orchid, the General Partners, and Southeast in offering or selling securities to Murphy, directly or indirectly, violated both the Unlawful Offers and Sales Provisions of the Virginia Securities Act and the Florida Securities and Investor Protection Act.

82. The solicitation letter, the projections, and the representations and assurances used by Orchid, the General Partners, and Southeast, in offering or selling securities to Mur-

phy and others, involved and constituted the employment of a device, scheme, or artifice to defraud, the making of untrue statements and omissions of statements of material facts (including the making of such statements and omissions by means of a prospectus or oral communication), and the engaging in acts, practices, or course of business that were fraudulent and deceitful, all in violation of Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)], Rule 10b-5 of the Securities and Exchange Commission, and Section 12(2) of the Securities Act of 1933.

83. Southeast is liable to Murphy for the violations of securities laws in that Southeast participated as a principal in those violations and for the further reason that Southeast acted as the partner, co-agent, controlling person (within the meaning of Section 20(a) of the Securities Exchange Act of 1934), and/or joint venturer of and with the General Partners.

84. As a proximate result of the violations of securities laws, Murphy has suffered hundreds of thousands of dollars damages.

WHEREFORE, Murphy demands judgment against the Defendant for rescission and/or damages, including attorneys' fees, interest, costs and such other and further relief as the court deems just and proper.

COUNT V

(BREACH OF FIDUCIARY DUTIES)

85. Murphy repeats and realleges Paragraphs 1 through 84 above as if fully set forth herein and further states as follows.

86. By their actions and omissions set forth herein, Southeast and the General Partners of Orchid breached the fiduciary obligations owed to Murphy.

87. By its actions and omissions set forth herein, Southeast knowingly participated in the General Partners' breaches of fiduciary obligations owed to Murphy.

88. The General Partners and Southeast are accountable to Murphy and to the other limited partners as fiduciaries. The General Partners and Southeast breached their fiduciary duties to Murphy and the other limited partners, failed to make full disclosure of all material facts, and failed to exercise good faith, reasonable business judgment, and integrity in handling Orchid affairs.

89. Under the circumstances set forth herein, Southeast owed a fiduciary obligation to Orchid and its general and limited partners, including Murphy. The fiduciary obligation owed by Southeast existed independently and separate and distinct from the loan documents.

90. Additionally and/or alternatively, even if Southeast itself did not owe fiduciary obligations to Murphy, Southeast is nevertheless liable for the General Partners breaches of fiduciary obligations owed to Murphy in that Southeast knowingly participated in those breaches of obligations.

91. As a direct and proximate result of Southeast's breaches of fiduciary obligations and of Southeast's participation in the General Partners breaches of fiduciary obligations owed to Murphy, Murphy has suffered millions of dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for damages, including attorney's fees, interest, costs and such other and further relief as the Court deems just and proper.

COUNT VI

(BREACH OF CONTRACT)

92. Murphy repeats and realleges Paragraphs 1 through 91 above as if fully set forth herein and further states as follows.

93. In August, 1989, for valuable consideration, Murphy, Orchid and Southeast entered into an investment contract

whereby Murphy was to be paid certain monetary sums annually in accordance with the projections.

94. Murphy has not been paid any sums due under the contract, all of which are justly due and owing to Murphy under the contract.

95. As a result, Murphy has suffered millions of dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for damages, including attorneys' fees, interest, costs and such other and further relief as the Court deems just and proper.

COUNT VII

(ACCOUNTING)

96. Murphy repeats and realleges Paragraphs 1 through 95 above as if fully set forth herein and further states as follows.

97. ARTICLE V, BOOKS AND RECORDS, 5.1 Accounting of the Second and Restated Limited Partnership, dated April 30, 1989, provides in part that the Orchid Island Partnership books and records shall be audited annually by a certified public accountant and that Orchid shall furnish an audit report to each limited partner annually within 120 days of the end of each calendar year; that the General Partners shall, within 45 days following the end of each quarter of the fiscal year, furnish each limited partner with an unaudited report; and, in addition, that not later than March 15th of every year, the General Partners shall furnish each limited partner with a copy of federal form 1065 (K-1) .

98. Murphy has not been furnished an audit report for 1990 and 1991, unaudited quarterly report for 1991, or a K-1 for 1990 or 1991.

WHEREFORE, Murphy demands judgment that the Defendant be compelled to furnish the required accounting to

Murphy and such other and further relief as the Court deems just and proper.

COUNT VIII

(FRAUD)

99. Murphy repeats and realleges Paragraphs 1 through 98 above as if fully set forth herein and further states as follows.

100. By their actions and omissions set forth herein, the General Partners perpetrated a fraud upon Murphy that induced him to invest in Orchid and the project, and further induced Murphy to continue his participation in Orchid and the project by means of the further fraud, nondisclosure fraud, constructive fraud, and negligent misrepresentations described herein.

101. Southeast is liable for the fraudulent activities of the General Partners in that Southeast:

A. knowingly participated in the wrongful activities of the General Partners;

B. knew that the General Partners' conduct constituted a breach of duties owed by the General Partners and gave substantial assistance and encouragement to the General Partners in their conduct;

C. acted as the co-agent, partner, and joint venturer of the General Partners;

D. is liable for the fraudulent activities of the General Partners under principles of partnership, joint venture and agency law, and principles of vicarious and respondeat superior liability.

102. As a proximate result of the fraud, nondisclosure fraud, and constructive fraud set forth herein, Murphy has suffered several million dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for damages, interest, costs and such other and further relied as the Court deems just and proper.

COUNT IX

RICO VIOLATIONS

103. Murphy repeats and realleges Paragraphs 1 through 102 above as if fully set forth herein and further states as follows.

104. By their activities set forth herein, Southeast and the General Partners engaged and participated in conduct in violation of federal and state laws, to wit: mail fraud indictable under 18 U.S.C. § 1341; wire fraud indictable under 18 U.S.C. § 1343; fraud in the sale of securities punishable under United States laws, and commercial bribe receiving and commercial bribery chargeable under state law, Fla. Stat. Ann. § 838.15 and 838.16 (West 1994), and punishable by imprisonment for more than one year.

105. Southeast and the General Partners participated in, aided and abetted, and conspired to commit, activities in violation of Section 1962 of Title 18 of the United States Code.

106. Orchid constituted an "enterprise" [hereinafter the "Enterprise"] within the meaning of that term as used in 18 U.S.C. §§ 1961 et seq.

107. Additionally and/or alternatively, at all times relevant hereto, Southeast and the General Partners associated together to form an ongoing, informal organization for the purposes of carrying out the wrongful activities set forth herein and for the purpose of carrying out the Project, and have thus constituted an association-in-fact "enterprise" within the meaning of that term as used in 18 U.S.C. §§ 1961 et seq.

108. As used herein, the term "Enterprise" shall refer to Orchid and/or to the association-in-fact enterprise consisting of the association of Southeast and the General Partners.

109. Each Enterprise had and has continuity of personnel, with the persons employed by or associated with the Enterprise performing particular functions and possessing certain authority within the organization.

110. In accordance with the organizational structure of each Enterprise, the persons associated therewith at times performed designated lawful functions. At other relevant times, however, certain persons associated with each Enterprise, including the General Partners and Southeast, used and abused each Enterprise in furtherance of the fraudulent, illegal and wrongful activities alleged herein.

111. The nature, organization, structure and activities of each Enterprise were such that it had an existence distinct from any one member of the Enterprise or from any individual person or entity employed by or associated with the Enterprise, and distinct from the pattern of racketeering activity engaged in by Southeast and the General Partners.

112. Each Enterprise functioned continuously during the relevant time period, and continues to function.

113. At all times relevant to this action and currently, each Enterprise constituted an enterprise as defined in 18 U.S.C. § 1961(4) which was and is engaged in and whose activities affected and affect interstate and foreign commerce in ways which include, without limitation, the following:

A. the acts of mail fraud and wire fraud described herein involving transmission of messages by United States interstate wire facilities and United States mail facilities;

B. the operation of the Enterprise involving transfers of money and property across state lines from and to the Enterprise, customers and suppliers, Southeast, and others, and to and from banks and other financial institutions.

114. At all times relevant to this action, Southeast and the General Partners each was and each still is a "person" within the meaning of 18 U.S.C. § 1961 et seq.

115. During the relevant times, in connection with the activities giving rise to this action, Southeast and the General Partners conspired with each other, and with others, to engage in, and did engage in, the various activities set forth herein and aided and abetted one another in these activities, all as proscribed and prohibited by 18 U.S.C. §§ 2, 1341, 1343, 1962(a-d), federal securities laws including 15 U.S.C. § 78j(b) and SEC Rule l0b-5, and Fla. Stat. Ann. § 838.15 and 838.16 (West 1994).

116. During the relevant times and in the furtherance of and for the purpose of executing the schemes and artifices to defraud alleged herein, Southeast and the General Partners on numerous occasions used and caused to be used the mail depositories of the United States Postal Service by both placing and causing to be placed mailable matter in said depositories and by removing and causing to be removed mailable matter from said depositories, each such use of the mails in connection with the scheme and artifice to defraud and to obtain money by means of false pretenses, constituting the offense of mail fraud as proscribed and prohibited by 18 U.S.C. § 1341. In furtherance of the fraudulent schemes set forth herein, the General Partners and Southeast caused uses of the United States mails which included without limitation the following:

A. On or about June 14, 1989, Haines sent the false, misleading, and fraudulent solicitation letter to Murphy via United States mail;

B. Upon information and belief, Haines and/or RR Co. sent similar solicitation letters to other potential and actual investors via United States mail;

C. On or about June 14, 1989, Haines sent the offering memorandum and the subscription agreement containing the false, misleading and fraudulent Paragraph 11 to Murphy via United States mail;

D. Upon information and belief, the offering memorandum and the subscription agreement containing the

false, misleading and fraudulent Paragraph 11 were sent from about 1988 through about 1990 by the General Partners via United States mail to other potential and actual investors;

E. On or about July 22, 1989, Arthur Andersen & Co. sent by United States mails a letter which asked Haines to inform any party who received the projections and might become an investor in Orchid to be made aware that the projections were prepared by the management of Orchid and not by Arthur Andersen and Co.

F. On July 31, 1989, Haines responded by letter via United States mails to Arthur Andersen and Co.'s letter of July 22, 1989 by stating that he had taken the actions described in Arthur Andersen & Co.'s letter of July 22, 1989.

G. Upon information and belief, the General Partners and Southeast caused the United States mails to be used in furtherance of the fraudulent asset management fees scheme described in Paragraph 41(G) above.

H. Upon information and belief, the General Partners and Southeast caused the United States mails to be used in furtherance of the fraudulent appraisal scheme described in Paragraph 41(H) above.

I. The General Partners and Southeast caused the United States mails to be used to disseminate the false, misleading, and fraudulent profit forecasts described in Paragraph 41(T) above.

J. At, for the most part, regular monthly intervals from 1988 to 1991, Southeast and the General Partners have caused to be placed into authorized depositories of the United States mail items, including financial statements and summaries of financial information, for delivery in furtherance of their schemes to defraud set forth herein and to perpetuate their ownership and control of the Project. The financial information did not accurately

reflect the financial condition of Orchid and of the Project, failed to disclose material facts, and suppressed and concealed the true financial condition of Orchid and the Project.

K. Southeast and the General Partners knowingly and intentionally failed to disclose material facts. Their deliberate misrepresentations and nondisclosures of material facts in conjunction with the financial information sent to Murphy through the United States mails constituted repeated violations of 18 U.S.C. § 1341 relating to mail fraud.

L. Upon information and belief, the General Partner and Southeast caused the United States mails to be used accomplish many of the other activities set forth herein. Murphy lacks complete information regarding the uses of the mails in furtherance of the wrongful activities set forth herein at the present time inasmuch as additional information is in the possession and control of the General Partners and other persons and entities.

117. During the relevant times, and in furtherance of and for the purpose of executing the schemes and artifices to defraud set forth herein, Southeast Bank and the General Partners, on numerous occasions, used and caused to be used interstate wire communications in interstate commerce, by making and causing to be made interstate telephone calls and other interstate wire communications as proscribed and prohibited by 18 U.S.C. § 1343. In furtherance of the fraudulent schemes set forth herein, the General Partners and Southeast caused uses of interstate wire communications which included without limitation the following:

A. On June 19, 1989, telephone calls were placed by means of interstate wire communication facilities between Murphy in Virginia and Anthony F. Dante III in Connecticut, and between Haines in Connecticut and Murphy in Virginia on June 19, 1989, as set forth in Paragraph 20.

B. Upon information and belief, the fraudulent misrepresentations made by Haines to Murphy via interstate telephone call were also made to other potential and actual investors.

C. On August 18, 1989, Murphy transferred, by means of interstate wire facilities, the sum of $515,672.37 from one of his accounts in Virginia to William Caldwell, the attorney for Haines, in Vero Beach, Florida, pursuant to Haines' and Caldwell's directions, to fund his subscription agreement of $500,000, and certain utility fees and other costs.

D. Upon information and belief, the General Partners and Southeast caused interstate wire communication facilities to be used accomplish many of the other activities set forth herein. Murphy lacks complete information regarding the uses of interstate wire communication facilities in furtherance of the wrongful activities set forth herein at the present time inasmuch as additional information is in the possession and control of the General Partners and other persons and entities.

118. Southeast and the General Partners violated Fla. Stat. Ann. § 838.15 and 838.16 (West 1994) in that Southeast and the General Partners each:

A. solicited, accepted, or agreed to accept benefits with the intent to violate a statutory or common law duty to which the person or entity receiving the benefits was subject as an agent or employee of another, as a fiduciary, and as an officer, director, partner, manager, or other participant in the affairs of an organization. Southeast received, for example, what was in effect a commercial bribe when it accepted the four lots as set forth in Paragraph 41(A). When the General Partners failed to timely comply with repayments to Southeast, Southeast and the General Partners caused Orchid to convey four (4) building lots to Southeast. This conveyance was done under

the false and fraudulent pretext that it was a lawful exercise of lender rights, but in fact Southeast itself had wrongfully contributed to Orchid's problems and had no lawful right to require or accept conveyance of the four lots. In taking these four lots, Southeast misappropriated over $800,000 worth of property as a payoff for its willingness to continue to provide support and assistance to the General Partners despite their continuing wrongdoing. Similarly, the General Partners accepted benefits from the Project in violation of its duties, as previously set forth.

B. knowing that another was subject to the duty described in Paragraph 118(A) and with intent to influence the other to violate that duty, conferred, offered to confer, or agreed to confer a benefit on the other. The General Partners, for example, paid what was in effect a commercial bribe to Southeast when the General Partners allowed Southeast to misappropriate from Orchid the four lots referred to in Paragraph 118(B). Southeast, for example, paid what was in effect a commercial bribe to the General Partners when, despite Southeast's domination and control of the Project, Southeast allowed the General Partners to receive the improper benefits referred to in Paragraph 41 above.

119. By their activities set forth herein, Southeast and the General Partners violated federal securities laws, including 15 U.S.C. § 78j(b) and SEC Rule l0b-5.

120. The acts of mail fraud, wire fraud, securities fraud, and commercial bribery constituted acts of "racketeering activity" within the meaning of that term as used in 18 U.S.C. § 1961(1), and are sometimes also referred to herein collectively as the "racketeering activity" and the "pattern of racketeering activity."

121. The racketeering activity occurred repeatedly, continuously, and without interruption from the time of their first

occurrence during or prior to 1988 and continued thereafter until at least 1991.

122. The acts of racketeering activity alleged above have sufficient continuity and relationship to constitute a "pattern of racketeering activity" within the meaning of 18 U.S.C. §§ 1961 et seq.

123. Additional information regarding the complete scope of the racketeering activities of Southeast and of the General Partners is not presently available to Murphy, and such information is controlled by the FDIC, as Receiver for Southeast, and the General Partners, and others.

124. Southeast and the General Partners were each employed by or associated with each Enterprise.

125. The acts of wire fraud, mail fraud, securities fraud, and commercial bribery perpetrated by Southeast and the General Partners upon Murphy constituted a pattern of racketeering activity consisting of more than two acts of racketeering activity, all of which occurred after the effective date of 18 U.S.C. § 1961 et seq., and the last of which within ten years after the commission of a prior act of racketeering activity within the meaning of 18 U.S.C. § 1961(5).

126. Southeast and the General Partners received income derived, directly or indirectly, from a pattern or racketeering activity in which each of them participated as a principal within the meaning of section 2, title 18, United States Code, and have used or invested, directly or indirectly, part of such income, or the proceeds of such income, in the acquisition of an interest in, or the establishment or operation of, each Enterprise, all in violation of 18 U.S.C. § 1962(a).

127. Southeast and the General Partners have through the pattern of racketeering activity referred to herein acquired or maintained an interest in or control of each Enterprise, in violation of 18 U.S.C. § 1962(b).

128. Southeast and the General Partners participated in the conduct of each Enterprise through the above-described

pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

129. Southeast and the General Partners agreed and conspired among themselves to violate 18 U.S.C. § 1962(a), (b) and (c), in violation of 18 U.S.C. § 1962(d).

130. The violations of Section 1962(a-d) of Title 18 of the United States Code have proximately caused Murphy great injury and harm in his business or property.

131. As a direct and proximate result of the foregoing violations of 18 U.S.C. § 1962 by Southeast and the General Partners, Murphy has been injured in his business and property in an amount equal to at least $3,050,000 (the promised 6.1 return on Murphy's $500,000 investment).

132. Additionally and/or alternatively, Southeast is liable for the violations of 18 U.S.C. § 1962(a-d) by either or both of the General Partners as a partner and joint venturer and under principles of vicarious, agency, co-conspirator, respondeat superior, and aider and abettor liability.

WHEREFORE, Murphy demands judgment against Southeast for treble damages in the amount of at least $9,150,000, interest, costs, attorney fees, and such other and further relief as the Court deems just and proper.

COUNT X

(NEGLIGENT MISREPRESENTATION)

133. Murphy repeats and realleges Paragraphs 1 through 132 above as if fully set forth herein and further states as follows.

134. Southeast knew or reasonably should have known, particularly in advance of the eve of the offering, of the requirement of its participants' awareness and approval of the proposed bond financing, and that the participants would not subordinate their liens to that created by the fond financing.

135. Southeast knew or should have known that Orchid would rely upon Southeast's failure to provide such material

information to Orchid in connection with Orchid's decision to undertake further loan obligations to Southeast and to expend additional resources.

136. Orchid did in fact reasonably rely upon Southeast's omissions.

137. As a result, Orchid has suffered millions of dollars in damages, and Murphy has suffered millions of dollars in damages.

WHEREFORE, Murphy demands judgment against the Defendant for damages, interest, costs and such other further relief as the Court deems just and proper.

COUNT XI

NEGLIGENCE

138. Murphy repeats and realleges Paragraphs 1 through 137 above as if fully set forth herein.

139. Southeast owed a duty to Orchid and to Murphy to use reasonable care in all of Southeast's activities in connection with the Project, and to act reasonably in the administration of the community development bond offering.

140. Southeast breached its duty of reasonable care, and thereby has caused great injury and harm to Orchid and to Murphy.

WHEREFORE, Murphy demands judgment against the Defendant for damages, interest, costs and such other further relief as the Court deems just and proper.

BRUCE G. MURPHY
/s/
Bruce G. Murphy, pro se
265 Llwyd's Lane
Vero Beach, Florida 32963-3252
(561) 231-4202

D.C. DISTRICT COURT OPINION

829 F. Supp. 3

Bruce G. MURPHY, pro se, Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORP., as Receiver for Southeast Bank, Defendant.

Civ. A. No. 92-1924 (CRR).

United States District Court,

District of Columbia.

Aug. 10, 1993.

Bruce G. Murphy, pro se.

Brendan Collins, Atty., U.S. Dept. of Justice, Civil Div., Washington, DC, together with Stuart E. Schiffer, Acting Asst. Atty. Gen., J. Ramsey Johnson, U.S. Atty. District of Columbia, John O. Birch, Asst. U.S. Atty., and J. Christopher Kohn, and Robert M. Hollis, U.S. Dept. of Justice, Civil Div., Washington, DC, for defendant.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

The above-captioned case is before the Court on the Plaintiff's Motion for Summary Judgment on Counts I and II, the Defendant's Motion to Dismiss the entire action, and the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss. After careful review of the above motions, the oppositions and replies thereto, and the applicable law, the Court shall grant Summary Judgment for the Defendant.[1]

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[1] Because the Defendant's Motion to Dismiss relies on matters outside the pleadings, the Court shall treat the Motion as one for Summary Judgment. *See* Fed.R.Civ.P. 12(c).

I. BACKGROUND

The Plaintiff, Bruce Murphy, was a limited partner in Orchid Island Associates Limited Partnership ("Orchid"), a real estate developer financed by Southeast Bank, N.A. ("Southeast"). Southeast loaned Orchid approximately $50 million between 1988 and 1990.

According to the Complaint, Orchid was the developer of the Orchid Island Golf and Beach Club project near Vero Beach, Florida ("the Project"). In 1989, the Plaintiff invested $515,672.37 to become a limited partner in Orchid. When sales revenues slowed, a plan was devised whereby Orchid would hold a public bond offering to raise funds. Orchid was to take a "bridge" loan from Southeast, and other Orchid principals would take additional loans from Southeast, to carry the project until the bond offering was complete. The proceeds from the bond offering were intended to repay the bridge loan and decrease Orchid's outstanding debt with Southeast. When the participants learned that the bond financing would result in a lien on the project superior to theirs, they rejected the bond offering and the deal fell through. Orchid's financial position subsequently worsened, and Southeast placed Orchid in default on its loans and foreclosed on the Orchid mortgages.

The Plaintiff contends that Southeast, by its actions in connection with the Project, was a partner with Orchid and exercised control over the Project and the actions of Orchid. The Plaintiff contends that Southeast's actions resulted in harm to the Plaintiff's financial interest in the Project. On September 19, 1991, Southeast was declared insolvent and subject to Federal Deposit Insurance Corporation ("FDIC") receivership. On December 16, 1991, the Plaintiff filed a proof of claim with the FDIC for $602,031.54, an amount comprised of the initial investment, expenses, and attorney fees. On June 23, 1992, the FDIC disallowed the Plaintiff's claim stating that the FDIC was not liable for any alleged damages. The FDIC declined to grant an administrative

hearing to review this determination. On August 20, 1992, the Plaintiff brought suit in this Court against the FDIC as receiver for Southeast. The Plaintiff's Complaint alleges breach of fiduciary duties, breach of contract, accounting deficiencies, fraud, negligent misrepresentation, and an unlawful offer to sell securities.

The FDIC has moved to dismiss Counts III through IX of the Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6), arguing that the doctrine of *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and 12 U.S.C. § 1823(e) bar these claims. More specifically, FDIC argues that the Plaintiff cannot sue Southeast under a joint venture theory, because all written documentation on the relationship between Orchid and Southeast explicitly rejects a joint venture relationship. The FDIC has also moved to dismiss the remaining Counts I and II, arguing that under 12 U.S.C. § 1821(d)(7)(A), the FDIC has discretion to determine when to establish administrative procedures to review claims, and that even if the FDIC is obligated to establish such procedures, they have discretion to determine which individual claimants are entitled to review. After careful review of the entire record in this action and the applicable law, the Court concludes that there are no material issues of fact in dispute that would preclude the entry of summary judgment for the Defendant.[2]

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[2] Summary judgment is awarded when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). It is well established that the Court must believe the non-movant's evidence and draw all justifiable inferences in his or her favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed.2d 202 (1986). A factual dispute must be material in order to preclude summary judgment; that is, it must be a dispute that may affect the outcome of the suit under the governing law. *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510.

II. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON COUNTS V THROUGH IX BECAUSE THE PLAINTIFF CANNOT RECOVER AGAINST THE FDIC UNDER AN ALLEGED UNWRITTEN JOINT VENTURE AGREEMENT PURSUANT TO *D'OENCH, DUHME & COMPANY* V. *FDIC*, 315 U.S. 447 (1942), AND 12 U.S.C. § 1823(e).

In Counts V through IX, the Plaintiff alleges breach of fiduciary duty, breach of contract, fraudulent omissions and representations, and negligent misrepresentations by Southeast. The Court concludes that Summary Judgment must be granted for the Defendant on these five claims because the Plaintiff cannot recover against Southeast on any theory of an alleged unwritten joint venture agreement pursuant to *D'Oench*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 and 12 U.S.C. § 1823(e).

The Plaintiff claims that Southeast and Orchid were partners in an unwritten joint venture agreement in connection with the Project. The crux of the Plaintiff's allegations is that Southeast acted in concert with Orchid in making decisions pertaining to the Orchid development that were separate and apart from Southeast's role as a mere lender to Orchid.[3]

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[3] For example, in Count V, the Plaintiff alleges that Southeast breached a fiduciary duty to the Plaintiff by failing to "exercise good faith, reasonable business judgment, and integrity in handling partnership affairs." Compl. at ¶ 40. In addition, in Count VI, the Plaintiff alleges that Orchid and Southeast were parties to an investment agreement with the Plaintiff in August, 1989, whereby the Plaintiff was to be paid an annual monetary sum. The Plaintiff further alleges breach of this contract by Southeast. *See* Compl. at ¶ 43. In Count VII, the Plaintiff alleges that Orchid breached its duty under the April 30, 1989 Accounting of the Second and Restated Limited Partnership, whereby Orchid was to furnish to each limited partner an annual audit report, a quarterly unaudited report, and an annual copy of the 1065 k-1 form. The Plaintiff seeks these documents for 1990 and 1991. However, this Count only refers to Orchid in connection with these reports and thus fails to state a claim against Southeast, and

However, such a claim is not cognizable under the law absent a written document. A party cannot rely on unrecorded agreements with a bank as the basis for claims or defenses against the FDIC. *D'Oench*, 315 U.S. 447, 62 S. Ct. 676; *Bowen* v. *FDIC*, 915 F.2d 1013 (5th Cir.1990); *see also Franklin Asaph Ltd.* v. *FDIC*, 794 F. Supp. 402 (D.D.C. 1992). Under *D'Oench*, transactions that do not appear on the bank's books are not cognizable in a court of law. *Bowen*, 915 F.2d at 1016. The policy underlying the *D'Oench* doctrine is "to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets [and liabilities] in the portfolios of the banks which [the FDIC] insures." *D'Oench* 315 U.S. at 457, 62 S.Ct. at 679. While the original *D'Oench* case involved a party attempting to use an oral promise as a defense to a suit on a note issued by the FDIC, the modern *D'Oench* doctrine also applies when the FDIC is acting in its capacity as receiver, as is the case here. See *Bell & Murphy & Assoc., Inc.* v. *Interfirst Bank Gateway*, 894 F.2d 750, 753 (5th Cir.1990), *cert. denied*, 498 U.S. 895, 111 S. Ct. 244, 112 L.Ed.2d 203 (1990); *see also Bowen*, 915 F.2d at 1015.

In this case, there are no documents establishing the existence of a joint venture between Orchid and Southeast. Furthermore, the loan agreements here explicitly reject a joint venture between Southeast and Orchid. The first three loan agreements expressly provide that "[t]he Lender is a lender only and shall not be considered a shareholder, joint venturer

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therefore the FDIC, for breach fiduciary duty to provide these reports to the Plaintiff.

Finally, in Count VII and IX, the Plaintiff alleges that Southeast's failure to inform Orchid of the requirement that the participants approve the proposed bond offering constituted fraudulent omissions and representations and negligent misrepresentations. *See* Compl. at ¶ 47-50. The Plaintiff alleges that these omissions and representations induced Orchid to take an additional loan and expend other resources in anticipation of the bond offering.

or partner of the Borrower."[4] Furthermore, the final loan agreement on March 21, 1991, states that:

> At no time did the Lender engage in or attempt to engage in or in any way involve itself in active management marketing, operation or control of the Project and has not, at any time, acted as a joint venturer in or a partner with the Debtor parties in connection with the Project. In the future, at no time shall Lender be construed as having acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project.

See Defendant's Motion to Dismiss at 6 (emphasis added).

The Plaintiff argues that his claims should not be barred because *D'Oench* only applies to a borrower of the bank who is trying to avoid an obligation. *See* Plaintiff's Opp'n at 4-5. He further contends that the *D'Oench* doctrine does not apply to certain tort claims that do not appear on the books of a failed bank. *Id.* at 3. The Court disagrees. The *D'Oench* doctrine acts as a bar where the Plaintiff is an investor, as well as when the Plaintiff is a borrower. *See In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448, 1461-62 (D.D.C.1992). This is consistent with the logic of *D'Oench* which bars claims by any parties who, unlike depositors, were capable of protecting themselves through written agreements. Id.

Furthermore, "[t]orts and other claims which center around an unrecorded agreement are also barred, even though the plaintiff is not asserting the agreement itself explicitly against the FDIC." *In re NBW Commercial Paper Litigation*, 826 F.Supp. at 1465; *see also, FDIC* v. *State Bank of Virden*, 893 F.2d 139 (7th Cir.1990); *but see, Astrup* v. *Midwest Fed. Sav. Bank*, 886 F.2d 1057, 1059-60 (8th Cir.1989). Thus, the claims here are exactly the type of claims which are barred by

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[4] This language was contained in the August 30, 1988 loan agreement, the April 13, 1989 loan agreement, and the January 31, 1990 loan agreement.

D'Oench.

In addition, the plain language of § 1823(e) bars this kind of claim.[5] Section 1823(e) provides that:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement--
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (1988) (emphasis added).

Thus, the Plaintiff's claims under the alleged joint venture theory are barred. Accordingly, the Court shall grant Summary Judgment on Counts V through IX for the Defendant.

III. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON THE SECURITIES LAW CLAIMS BECAUSE THE PLAINTIFF HAS NOT STATED ANY INDEPENDENT BASIS FOR

[5] This section is "essentially a codification of *D'Oench*." *Bowen*, 915 F.2d at 1015. Whether the bar of *D'Oench* and section 1823 is coextensive has been debated, *see In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448 (D.D.C.1992) however, such an inquiry is not necessary in the instant case.

SOUTHEAST'S LIABILITY OTHER THAN AN ALLEGED UNWRITTEN AGREEMENT.

In Counts III and IV, the Plaintiff alleges securities law violations which he claims do not rely on a joint venture theory. In Count III the Plaintiff alleges that Orchid violated the registration requirement of the Virginia Securities Act § 13.1-507 by not registering the Orchid partnership units as securities. *See* Compl. at ¶ 35-36. Count IV alleges that the solicitation letter used by "[Orchid], the general partners, and [Southeast]" violated the "Unlawful Offers & Sales Provisions" of the Virginia Securities Act and the Florida Securities and Investor Protection Act. See Compl. at ¶ 38. Because the Plaintiff cannot point to any independent basis for liability against Southeast separate and apart from an alleged unwritten agreement, the Court shall also grant Summary Judgment for the Defendant on these claims.[6]

The Plaintiff argues that he can establish a degree of control by Southeast over the Project sufficient to satisfy § 13.1-522(B) even if he cannot establish the joint venture theory. *See* Plaintiff's Opp'n at 5-6. However, the Plaintiff cannot establish that Southeast was a "material participant" because, as set forth above, all of the written agreements between Orchid and Southeast explicitly reject the proposition that Southeast was anything more than simply a lender to Orchid. To the extent that the Plaintiff attempts to rely on an unwritten agreement to prove these securities violations claims, they are again barred by *D'Oench*. Courts have held

[6] In his Complaint, the Plaintiff does not even mention Southeast in the discussion of Count III, and thus on the face of the Complaint, the Plaintiff does not state any cause of action against Southeast. Not until his Opposition to the Defendant's Motion to Dismiss, does the Plaintiff allege that Southeast is also liable for this alleged violation under Va.Code Ann. § 13.1-522(B) which makes "material participants" in an unlawful sale also liable for any violations. However, even under the theory set forth in the Plaintiff's Opposition, this claim must fail because it is still barred by *D'Oench* and § 1823(e).

that *D'Oench* prohibits any claims based upon an unwritten agreement, even where the claims have been characterized as violations of securities laws. *See In re NBW Commercial Paper Litigation*, 826 F. Supp. at 1466-69; see also [sic] (citing *Kilpatrick v. Riddle*, 907 F.2d 1523, 1529 (5th Cir.1990), *cert. denied*, 498 U.S. 1083, 111 S. Ct. 954, 112 L. Ed.2d 1042 (1991)).[7] Accordingly, the Court shall grant Summary Judgment on Count III for the Defendant.

Even assuming arguendo, that the Plaintiff once had a cognizable securities law claim not arising under a joint venture theory, the Plaintiff's claims would still be barred under § 13.1-522(D) which provides that "[n]o suit shall be maintained to enforce any liability created under this section [including § 13.1-502 and § 13.1-507] unless brought within two years after the transaction upon which it is based." Here the Plaintiff invested in Orchid in August of 1989. *See* Compl. at ¶ 19. However, the Plaintiff did not file the current action until August 20, 1992. *See* Compl. at 1. Thus, the Plaintiff's securities claims are barred under the plain language of the Virginia statute.

IV. THE COURT SHALL GRANT SUMMARY JUDGMENT FOR THE DEFENDANT ON THE ADMINISTRATIVE CLAIMS BECAUSE, UNDER THE PLAIN LANGUAGE OF THE STATUTE, THE FDIC HAS DISCRETION IN DETERMINING WHETHER TO ESTABLISH PROCEDURES TO REVIEW CLAIMS.

The Plaintiff also seeks declaratory relief and mandamus alleging that the FDIC did not provide the Plaintiff with an

[7] A claim for securities violations against the FDIC is cognizable when the act being sued on has no connection to an unwritten agreement but rather involves an independent basis for liability. *See In re NBW Commercial Paper Litigation*, 826 F. Supp. at 1467-68 (Claim for an unlawful sale of securities in violation of the Securities Act of 1933 not barred by *D'Oench*). However, no such independent basis for liability exists in this case.

administrative hearing or other alternative dispute resolution procedure pursuant to 12 U.S.C. § 1821(d)(7)(A) or 12 U.S.C. § 1821(d)(7)(B) to review the denial his claim. The Court finds however, that the FDIC has discretion in determining whether to establish review procedures, and thus the Court shall grant Summary Judgment for the Defendant on these claims.

The plain language of section 1821(d)(4) provides that the FDIC "may prescribe regulations ... providing for administrative determination of claims and review of such determination." (emphasis added). More specifically, an administrative hearing may be provided "if any claimant requests review ... and the [FDIC] agrees to such request ...." 12 U.S.C. § 1821(d)(7)(A) (emphasis added). Finally, the FDIC may provide other review procedures "as may be appropriate." 12 U.S.C. § 1821(d)(7)(B)(i). These provisions grant the FDIC discretion in determining whether to establish procedures to review claims. Furthermore, courts interpreting these sections have held similarly. *See FDIC* v. *Hanson*, 799 F. Supp. 954, 958 (D.Minn.1992) (FDIC has no obligation under § 1821(d)(4) to establish administrative procedures for the review of its denial of a claim); *see also, Mansolillo* v. *FDIC*, 804 F. Supp. 426, 430 (D.R.I.1992). Finally, even assuming arguendo, that the FDIC was required to establish such procedures, the statute still provides the FDIC with discretion to determine which particular claimants are entitled to review. *See* § 1821(d)(7)(A). Thus, because the Plaintiff is not entitled to an administrative review of his claim, the Court shall grant Summary Judgment on Counts I and II for the Defendant.

V. CONCLUSION

For all the reasons stated above, the Court concludes that the Plaintiff's claims are barred by the doctrine of *D'Oench, Duhme & Company* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and 12 U.S.C. § 1823(e). Accordingly, the Court shall grant Summary Judgment for the Defendant.

Furthermore, the Court shall deny the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss as moot. The Court shall enter an Order of even date herewith in accordance with this Memorandum Opinion.

ORDER

Upon consideration of the Plaintiff's Motion for Summary Judgment, the Defendant's Motion to Dismiss, and the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss, the oppositions and replies thereto, the arguments of counsel, the record herein, the applicable law, and for the reasons articulated in this Court's Memorandum Opinion of even date herewith, it is, by the Court, this 10th day of August, 1993,

ORDERED that the Plaintiff's Partial Motion for Summary Judgment on Counts I and II shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Defendant's Motion for Summary Judgment on Counts I through IX shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Defendant's Motion to Stay Discovery Pending Resolution of its Motion to Dismiss is DENIED as moot; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

SOUTHERN DISTRICT OF FLORIDA OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 96-2614-CIV-MOORE

BRUCE G. MURPHY,

Plaintiff,

vs. **ORDER**

FILED BY (AM) D.C.
JUL 27 1998
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

JEFFREY H. BECK, as Successor Agent for the Federal Deposit Insurance Corporation as Receiver for Southeast Bank, N.A.,

Defendant.
_____/

THIS CAUSE came before the Court upon Defendant"s Motion to Dismiss (filed June 14, 1996 in United States District Court for the District of Columbia).

UPON CONSIDERATION of the motion, responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

BACKGROUND

In August 1989, Plaintiff Bruce Murphy ("Murphy") invested $515,672.37 to purchase a limited partnership interest in Orchid Island Associates Limited Partnership ("Orchid"). Orchid was formed to develop the Orchid Island Golf and

Beach Club Project (the "Project") for which Southeast Bank ("Southeast") was the lender. Pursuant to various loan agreements, Southeast loaned Orchid approximately $50 million dollars between 1988 and 1991. Orchid eventually defaulted on its loans and Southeast foreclosed on the property. Southeast itself was declared insolvent on September 19, 1991 and placed in Federal Deposit Insurance Corporation ("FDIC") receivership. On May 11, 1998, this Court permitted Jeffrey Beck ("Beck"), as Successor Agent to the FDIC as Receiver for Southeast to be substituted as the party defendant in this action.

In this action, Murphy alleges that Southeast, by its actions in connection with the Project, was a joint venturer or de facto partner with Orchid and that Southeast controlled the project. Murphy alleges that Southeast's actions caused the loss of his investment. Murphy filed this action in August 1992 before the United States District Court for the District of Columbia alleging breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations. The FDIC moved to dismiss the complaint on the grounds that Murphy's claims were barred by the doctrine of D'Oench, Duhme & Company v. FDIC, 315 U.S. 447 (1942), and, more specifically, that Murphy could not sue Southeast under a joint venture theory because all written documentation on the relationship between Orchid and Southeast explicitly rejected a joint venture relationship. On August 10, 1993, the United States District Court for the District of Columbia granted the FDIC's Motion to Dismiss. Murphy v. FDIC, 829 F. Supp. 3 (D.D.C. 1993). Citing the D'Oench doctrine, the court held that Murphy could not assert a claim against the FDIC based on the theory that Southeast was a joint venturer in the Project because there was no written joint venture agreement. On appeal, the Court of Appeals for the D.C. Circuit reversed the majority of the district court's decision, holding that the D'Oench doctrine

was inapplicable. Murphy v. FDIC, 63 F.3d 34 (D.C. Cir. 1995).

On May 29, 1996, subsequent to the D.C. Circuit's decision, Murphy filed an Amended Complaint seeking declaratory relief (Count I), mandamus (Count II)[8] and alleging a failure to register securities (Count III), unlawful offer and sale of securities (Count IV), breach of fiduciary duty (Count V), breach of contract (Count VI), accounting irregularities (Count VII), fraud (Count VIII), RICO violations (Count IX), negligent misrepresentation (Count X) and negligence (Count XI).[9] Beck once again moves to dismiss the entire complaint, arguing the loan documents explicitly refute the existence of a joint venture agreement, or in the alternative, on various substantive grounds.

DISCUSSION

I. Motion to Dismiss Standard

A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. Milburn v. United States, 734 F.2d 762, 765 (11th Cir. 1984). On a motion to dismiss, the Court notes that it must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir. 1988), cert. denied sub nom. Peat Marwick Main & Co. v. Tew, 486 U.S. 1055 (1988). A court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no

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[8] FDIC was granted summary judgment on Counts I and II and thus these Counts are no longer before this Court. Murphy. FDIC, 61 F.3d 34 (D.C. Cir. 1995).

[9] By Order dated August 20, 1996, United States District Judge Charles R. Richey transferred this case to the Southern District of Florida. Judge Richey found that the plaintiff and vast majority of witnesses resided in this district. In addition, the failed land project is located in this district and Southeast Bank was originally located in Miami. Upon transfer, the case was assigned to this Court.

set of facts in support of his claim which would entitle him to relief." Conley v. Gibson. 355 U.S. 41, 45-46 (1957) (citations omitted); South Florida Water Management Dist. v. Montaivo, 84 F.3d 402, 406 (11th Cir. 1996). Nonetheless, to withstand a motion to dismiss, it is axiomatic that the complaint must allege facts sufficiently setting forth the essential elements of a cause of action.

II. Existence of a Joint Venture

Beck argues that because the alleged joint venture between Southeast and Orchid is evidenced by actions taken by Southeast, rather than by any written joint venture agreement, this action should be dismissed because the loan documents expressly disclaim the existence a joint venture. In this case, there are no documents creating a joint venture between Southeast and Orchid. Furthermore, the loan agreements at issue in this case expressly reject a joint venture between Southeast and Orchid. The first three loan agreements, dated August 30, 1998, April 13, 1989 and January 31, 1990, explicitly provide that "[t]he Lender [Southeast] is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower [Orchid]." In addition, the final loan agreement, dated March 21, 1991, states:

> At no time did the Lender engage in or attempt to engage in or in any way involve itself in active management marketing, operation or control of the Project and has not, at any time, acted as a joint venturer in or a partner with the Debtor parties in connection with the Project. In the future, at no time shall Lender be construed as having, acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project (emphasis added).

The plain language of the agreements is clear: No joint venture existed between Southeast and Orchid. See also FDIC v. Key Biscayne Develop. Assoc., 858 F.2d 670 (11th Cir. 1988) (observing that construction of a contract is a matter for the court to decide and expressly finding that agreements containing the language "It is understood and agreed that [Continental]. . . by issuing this loan or by taking any action pursuant hereto shall not be deemed a partner or joint venturer . . ." was clear evidence that the loan agreements did not create a joint venture).

Murphy does not dispute that the agreements contain express disclaimer language. Murphy argues, however, that he was not a party to any of the agreements containing the disclaimers and that "Florida law clearly permits a third party such as Murphy to establish the existence of a joint venture or de facto partnership relationship notwithstanding a purported disclaimer of a joint venture between the alleged joint venturers." Murphy's argument is flawed for two reasons: First, Murphy is not a third party who was "not a party to the disclaimer agreement." Murphy, by virtue of his investment, was a limited partner in Orchid. Orchid is the signatory on each of the loan documents. Thus, as a limited partner in Orchid, Murphy is a party to, and bound by, the agreements. In addition, even were Murphy correct in arguing he was not a party to the agreements, there is still no evidence of a joint venture. Under Florida law, courts generally look at five elements to determine whether a joint venture exists: (1) community of interest in the performance of a common purpose; (2) joint control or right of control; (3) joint proprietary interest in the subject matter; (4) right to share in the profits; and (5) a duty to share in the losses. Kislak v. Kreedian, 95 So. 2d 510 (Fla. 1957). A review of the loan agreements in this case fails to establish the existence of a joint venture, particularly because there is no evidence that Southeast had a right to share in any profits or any duty to share in any losses.

The Court further notes that the D'Oench doctrine prevents Murphy from stating a claim. As recognized by the United States District Court for the District of Columbia in ruling on the original motion to dismiss, Murphy's claim "is not cognizable under the law absent a written document . . .

and transactions that do not appear on the bank's books are not cognizable in a court of law." Murphy, 829 F. Supp. at 5-6. The District of Columbia Court of Appeals reversed, citing the Supreme Court decision in O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) and expressly stating that the federal common law D'Oench doctrine has been displaced by federal statute. Murphy, 61 F. 3d at 36. In direct contrast to the D.C. Circuit, however, the Eleventh Circuit still adheres to the D'Oench doctrine. In Motorcity of Jacksonville Ltd. v. Southeast Bank, 83 F.3d 1317 (11th Cir. 1996), the Eleventh Circuit specifically "disagree[d] with Murphy's reliance on O'Melveny" and held that the federal common law D'Oench doctrine was not preempted. Id. at 1333-34. Accordingly, because the D'Oench doctrine is still valid in this circuit, the Court finds the district court's reasoning in Murphy persuasive that, in addition to the reasons stated above, the D'Oench doctrine prevents Murphy from stating a valid claim.

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that Beck's Motion to Dismiss is GRANTED. The Clerk of Court shall mark this case CLOSED. All motions not otherwise ruled upon are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of July, 1998.

/S/

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: Hilare Bass, Esq.
John F. Bloss, Esq.

ELEVENTH CIRCUIT OPINION

208 F.3d 959

Bruce G. MURPHY, Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Southeast Bank, N.A.; Jeffrey H. Beck, Defendants-Appellees.

No. 98-5292.

United States Court of Appeals,
Eleventh Circuit.
April 7, 2000.

John F. Bloss, Clark & Wharton, Greensboro, NC, for Plaintiff- Appellant.

Elliot H. Scherker, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BIRCH and MARCUS, Circuit Judges, and ALAIMO*, Senior District Judge.

MARCUS, Circuit Judge:

Plaintiff-Appellant Bruce G. Murphy ("Murphy") appeals the district court's order dismissing his amended complaint against Defendant Jeffrey Beck, as Successor Agent for the Federal Deposit Insurance Company, ("FDIC"). Among other things, the district court held that Murphy's claims

* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

against the FDIC were barred by the federal common law *D'Oench, Duhme* doctrine first expounded by the Supreme Court in *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942). Because acceptance of the *D'Oench, Duhme* doctrine is well-settled in this Circuit, and because we can discern no sound reason for not applying the doctrine in this case, we affirm the district court's order dismissing Murphy's complaint.

I.

The facts underlying this case are straightforward, but the procedural history of the case is both unusual and important. In June 1989, Murphy received a letter from Robert H. Haines, III, a general partner in Orchid Island Associates Limited Partnership ("Orchid"), soliciting Murphy's investment in Orchid's development of the Orchid Island Golf and Beach Club Project (the "Project") located in Indian County, Florida. The letter projected a 6.1 multiple return on investments. Soon thereafter, on August 18, 1989, Murphy invested $515,672.37 in a limited partnership interest in Orchid.

Southeast Bank provided several loans for the Project from the fall of 1988 until the beginning of 1991. These loans totaled approximately $50 million. Orchid eventually defaulted on its loans and Southeast foreclosed on the property. Southeast itself was declared insolvent on September 19, 1991 and placed in FDIC receivership.

On August 20, 1992, Murphy filed suit in the United States District Court for the District of Columbia against the FDIC, as receiver for Southeast, alleging that Southeast asserted extensive control over the Project and that Southeast knew about and participated in the fraudulent activities of Orchid's principals. According to the complaint, Murphy was induced to invest by a solicitation letter from Orchid which falsely represented that projections by Arthur Anderson & Co. reflected a "6.1 multiple return on [ ][his] investment." Murphy claimed that Southeast acted in concert with Orchid

in making decisions pertaining to the Orchid development, and that these decisions were separate and apart from Southeast's role as a mere lender to Orchid. Murphy added that Southeast's actions as a joint venturer with Orchid in the Project caused the loss of his financial investment. Accordingly, Murphy sued for breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation and securities violations.

The FDIC moved to dismiss the complaint on the grounds that Murphy's claims were barred by the federal common law doctrine of *D'Oench, Duhme*. On August 10, 1993, the district court, treating the FDIC's motion as a motion for summary judgment, granted summary judgment on all counts. The district court ruled that under the *D'Oench, Duhme* doctrine, Murphy could not assert a claim against the FDIC based on the theory that Southeast was a joint venturer with Orchid in the Project because there was no written joint venture agreement between the two. *Murphy* v. *FDIC*, 829 F. Supp. 3, 5-6 (D.D.C. 1993). In fact, the written agreements between the bank and Orchid denied such a relationship. *Id.* On appeal, the Court of Appeals for the D.C. Circuit reversed the district court's decision on all but two counts,[10] holding that the *D'Oench, Duhme* doctrine had been preempted by the Financial Institutions Reform, Recovery, and Enhancement Act

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[10] The Circuit Court affirmed the district court's grant of summary judgment in favor of the FDIC on Murphy's two procedural claims seeking 1) a declaratory judgment that the FDIC is required by statute to establish an ADR procedure, and 2) a writ of mandamus compelling that result. As for the first claim, the court held that although the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 (FIRREA) did not seem to require the FDIC to establish an ADR process, the FDIC appeared to have initiated such a program and therefore Murphy's request for the court to order the FDIC to do so was moot. As for the second claim, the court held that the FIRREA gave the FDIC discretion to decide whether to refer any particular case to ADR and therefore Murphy was not entitled to an order compelling the FDIC to direct his case to ADR. *Murphy*, 61 F.3d at 40-41.

of 1989 (FIRREA) and did not, therefore, bar Murphy's claims. *See Murphy* v. *FDIC*, 61 F.3d 34, 39 (D.C. Cir. 1995) (concluding that "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one").

After remand to the district court, the FDIC again moved to dismiss the complaint for failure to state a claim. Without ruling on the motion, the district court transferred the case to the Southern District of Florida, concluding that the Southern District of Florida was a more convenient location for the case because the Plaintiff and the majority of witnesses resided in the district and both the Project and Southeast Bank had been located there. The district court for the Southern District of Florida substituted Jeffrey H. Beck as successor agent for the FDIC and, thereafter, granted the FDIC's Motion to Dismiss. The district court offered three alternative grounds for its decision: first, loan agreements between Orchid and Southeast disclaiming the existence of a joint venture barred Murphy, as a limited partner in Orchid and therefore a party to the agreements, from asserting such a joint venture; second, even if Murphy were not a party to the agreements, he failed to prove the existence of a joint venture relationship between Orchid and Southeast; and finally, the federal common law *D'Oench, Duhme* doctrine barred Murphy's claim.

II.

We review a district court's order granting a motion to dismiss for failure to state a claim de novo. *Beck* v. *Deloitte & Touche*, 144 F.3d 732, 736 (11th Cir. 1998); *McKusick* v. *City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996). When considering a motion to dismiss for failure to state a claim, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiff. *Kirby* v. *Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999).

On appeal, we need only consider the district court's third reason for dismissal. Plainly, the *D'Oench, Duhme* doctrine was intended "to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets [and liabilities] in the portfolios of the banks which [the FDIC] insures." *D'Oench, Duhme*, 315 U.S. at 457, 62 S. Ct. at 679, 86 L. Ed. 956. The doctrine originated more than half-a-century ago in the case of *D'Oench, Duhme & Co., Inc.* v. *FDIC* where a securities dealer who executed a demand note with a bank tried to prevent the FDIC, which had acquired the note, from enforcing it because of the dealer's separate agreement with the bank that the note would not be called for payment. The Supreme Court rejected the defense and squarely held that a secret agreement not on the bank's records could not operate as a defense against the FDIC's suit. *Id.* at 459, 62 S. Ct. at 680.[11]

The Eleventh Circuit has described the scope of the

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[11] Eight years later, Congress partially codified the holding of *D'Oench, Duhme*, as section 2(13)(e) of the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e)(1). This provision, as modified by the Financial Institutions Reform, Recovery, and Enforcement Act, Pub.L. No. 101-73, currently provides:

> No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

D'Oench, Duhme doctrine in these terms:

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

Baumann v. *Savers Federal Sav. and Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir. 1991). *See also Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317, 1326 (11th Cir. 1996) (*en banc*), *vacated and remanded by Hess* v. *FDIC*, 519 U.S. 1087, 117 S. Ct. 760, 136 L.Ed.2d 708 (1997), *reinstated by Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (11th Cir. 1997), (*en banc*), *cert. denied*, *Hess* v. *FDIC*, 523 U.S. 1093, 118 S. Ct. 1559, 140 L.Ed.2d 791 (1998).[12] We have held that the doctrine "'applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records.'" *OPS Shopping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 308 (11th Cir. 1993) (quoting *Baumann*, 934 F.2d at 1510). We have also made clear that the doctrine applies when the FDIC is acting as a receiver. *See FSLIC* v. *Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1274, 1276-77 (11th Cir. 1989) (holding that the federal common law *D'Oench, Duhme* doctrine protects the FSLIC and the FDIC in both receiver and corporate capacities); *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991) (*per curiam*) (citing

[12] The Supreme Court granted certiorari on *Motorcity I*, vacated our judgment, and remanded the case for further consideration in light of its decision in *Atherton* v. *FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L.Ed.2d 656 (1997). In *Motorcity II*, after considering the Supreme Court's decision in *Atherton*, we reaffirmed our previous holding in *Motorcity I* and reinstated that opinion.

cases for the proposition that "courts have consistently applied the [*D'Oench, Duhme*] doctrine to those situations where the FDIC was acting in its capacity as receiver").

Because no written agreement exists between Southeast and Orchid, if the *D'Oench, Duhme* doctrine applies in this case, it bars Murphy's claims against the FDIC which are based on his allegations that Orchid and Southeast were acting as joint venturers. Murphy argues, however, that there are four independent reasons why the *D'Oench, Duhme* doctrine should not be applied in this case: first, the choice of law doctrine requires application of D.C. Circuit law rather than Eleventh Circuit law; second, the D.C. Circuit's decision that the *D'Oench, Duhme* doctrine has been preempted by the FIRREA should be accepted as law of the case; third, the doctrine should not be applied to cases in which the receivership has generated a surplus; and finally, the doctrine is no longer valid in light of recent Supreme Court rulings. We are not persuaded by any of these arguments and address each in turn.

A.

We have had occasion recently to disagree with the D.C. Circuit as to the continued viability of the *D'Oench, Duhme* doctrine. In its consideration of this case before transfer, the D.C. Circuit held that the doctrine had been preempted by the FIRREA, and therefore could not bar Murphy's claims. *Murphy* v. *FDIC*, 61 F.3d at 38. According to the D.C. Circuit, "the Supreme Court ... necessarily decided the *D'Oench* question.... [T]he inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one." *Id.* at 39. In both *Motorcity I* and *Motorcity II*, we expressly disagreed with the D.C. Circuit's rejection of the doctrine. *See Motorcity I*, 83 F.3d at 1327 (noting that "[i]n *Murphy* v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995), the D.C. Circuit recently held that the Supreme Court's reasoning in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114

S. Ct. 2048, 129 L. Ed.2d 67 (1994), leads 'ineluctably' to the conclusion that the common law *D'Oench* doctrine has been preempted. *Id.* at 38.... We disagree ... and hold that the federal common law *D'Oench* doctrine has not been preempted by statute" (internal citations omitted)); *Motorcity II*, 120 F.3d at 1141-44 (noting the circuit split between the D.C. and Eighth Circuits, which have held that the FIRREA displaced the *D'Oench, Duhme* doctrine, and the Fourth Circuit, which has held that it did not, and holding that the federal common law doctrine was not preempted by the FIRREA and remained good law in this Circuit). In *Motorcity II* we concluded that "the analysis set forth in our prior *en banc* opinion [*Motorcity I*] reflects the most reasonable reading of Congress's intent – *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine." *Id.* at 1144.

Murphy argues nevertheless that we should apply the law of the D.C. Circuit rather than our own law to his claims because the law of the transferor court should govern in the context of transfers pursuant to 28 U.S.C. § 1404(a). Although this circuit has not addressed the question of whether a transferee court should follow its own interpretation of federal law or that of the transferor court, several other circuits have addressed the question, and all have concluded that the transferee court should apply its own interpretation of federal law. We find the reasoning of these circuits persuasive.

In *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987), the D.C. Circuit addressed the question of what law to apply to a number of wrongful death actions that were transferred to the District of Columbia pursuant to 28 U.S.C. § 1407 for consolidated pretrial proceedings. The substantive issue before the court was whether the per-passenger damage limits set by the Warsaw Convention should be applied to limit Korean Air Lines' liability when the type size of the liability limit printed on the tickets

was smaller than the size required by the Montreal Agreement. The district court, interpreting District of Columbia law, held that the damage limits were applicable. *See In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985). This ruling was, however, contrary to precedent in the Second Circuit where several of the cases had originally been filed. *See In re Korean Air Lines Disaster*, 829 F.2d at 1172. The D.C. Circuit affirmed the district court's order squarely holding "that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit." *Id.* at 1173.

The court also distinguished *In re Korean Air Lines* from *Van Dusen* v. *Barrack*, 376 U.S. 612, 84 S. Ct. 805, 11 L.Ed.2d 945 (1964), in which the Supreme Court held that when a defendant in a diversity action moves for a transfer of venue under 28 U.S.C. 1404(a), the state law that would have applied in the transferor court adheres to the case. *See Van Dusen*, 376 U.S. at 637-39, 84 S. Ct. at 820. The D.C. Circuit explained that the logic behind *Van Dusen* – reflecting the need to ensure that federal and state courts uniformly apply the same state law to diversity cases regardless of where the cases are tried – does not apply to a case brought under federal law because federal law is supposed to be unitary. *In re Korean Air Lines*, 829 F.2d at 1175-76. As the Circuit Court explained:

> Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.

Id. at 1175-76. The court concluded that "[t]he federal courts ... owe respect to each other's efforts and should strive to

avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." *Id.* at 1176.

The Second, Eighth, and Ninth Circuits uniformly have agreed with the D.C. Circuit that in cases where federal law is at issue, transferee courts are obligated to follow their own interpretation of the relevant law. *See Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1171 n. 4 (8th Cir. 1998) (holding that the consolidated issues the court was hearing were controlled by the law of its circuit and not the law of the various circuits from which the cases were transferred); *Temporomandibular Joint (TMJ) Implant Recipients* v. *E.I. DuPont De Nemours & Co.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (holding that "[w]hen analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located"); *Newton* v. *Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (same); *Menowitz* v. *Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993) (same).[13]

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[13] The Seventh Circuit has also agreed, in *dicta*, in the factually dissimilar case of *Eckstein* v. *Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), with the reasoning of the D.C. Circuit. *Eckstein* involved a question of the appropriate statute of limitations for a claim of fraud arising under § 10(b) of the Securities Exchange Act of 1934. The case involved two sets of plaintiffs, both of whom filed their action before 1990. When the litigation began, federal courts throughout the country derived the periods of limitations in § 10(b) cases from state law. *See Eckstein*, 8 F.3d at 1124. However, in July 1990, the Seventh Circuit overruled its opinions that had looked to state law and held that § 13 of the Securities Act of 1933 supplied the proper statute of limitations for § 10(b) fraud claims. *See Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990). In June 1991, the Supreme Court agreed with the Seventh Circuit that the federal securities laws are the proper source of the period of limitations but selected § 9(e) of the Securities Exchange Act of 1934 as the most appropriate rule. *See Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n. 9, 111 S. Ct. 2773, 2782 n. 9, 115 L. Ed.2d 321 (1991). Congress responded to *Lampf* by enacting stopgap legislation which provided that the proper period of limitations for cases filed on or before June 19, 1991, was the limitation period provided by the laws in the applicable jurisdiction as those law existed on June 19, 1991. *See Eckstein*, 8 F.3d at 1124 (quoting § 27A of the '34 Act, 15 U.S.C. § 78aa-1(a)). The district court in Eckstein held that under the stopgap legislation provided by § 27A, the law of the Seventh Circuit as stated in Short should control the statute of limitations imposed on both the plaintiffs who filed originally in the Seventh Circuit and those who filed originally in the Ninth Circuit. *See Majeski* v. *Balcor Entertainment Co. Ltd.*, 786 F. Supp. 1458, 1461 (E.D. Wis. 1992). On appeal, the Seventh Circuit faced the question of the proper application of § 27A to transferred cases. The Seventh Circuit agreed with the D.C. Circuit's reasoning in *In re Korean Air Lines* that a transferee court should normally use its own best judgment about the meaning of federal law when evaluating a federal question. According to the court, "A single federal law implies a national interpretation. Although courts of appeals cannot achieve this on their own, the norm is that each court of appeals considers the questions independently and reaches its own decision, without regard to the geographic location of the events giving rise to the litigation." *Eckstein*, 8 F.3d at 1126. The court concluded, however, that Congress' stopgap legislation required a different result in this case. The Seventh Circuit held that § 27A required them to apply the statute of limitations of the Seventh Circuit to the plaintiffs who filed originally in Wisconsin and the statute of limitations of the Ninth Circuit to the plaintiffs who filed originally in California as those laws existed on June 19, 1991. *Id.* at 1127-28. Unlike in *Eckstein*, there is no Congressional mandate in the present case instructing us to depart from the usual rule that a court of appeals must apply its own interpretation of federal law.

We find the reasoning of the D.C., Second, Eighth, and Ninth Circuits persuasive. Since the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit. Therefore, we conclude that the law of the Eleventh Circuit, rather than the law of the D.C. Circuit, regarding the continued viability of the *D'Oench, Duhme* doctrine, was properly applied in this case.

B.

Second, Murphy argues that even if the law of the Eleventh Circuit should, in general, be applied to cases transferred

here, the previous holding of the D.C. Circuit in this case – that the *D'Oench, Duhme* doctrine has been preempted by the FIRREA – binds this Court as "law of the case." "[L]aw of the case is an amorphous concept." *Arizona* v. *California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). The doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Id*; *see also Robinson* v. *Parrish*, 720 F.2d 1548, 1549-50 (11th Cir. 1983). The purpose of the doctrine is to bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already decided. *See Wheeler* v. *City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984); *United States* v. *Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984); *Robinson*, 720 F.2d at 1550. The law of the case doctrine does not, however, require rigid adherence to rulings made at an earlier stage of a case in all circumstances. *See Robinson*, 720 F.2d at 1550. The doctrine "directs a court's discretion, it does not limit the tribunal's power." *Arizona*, 460 U.S. at 618, 103 S. Ct. 1382; *see also DeLong Equip. Co.* v. *Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir. 1993) (noting that the doctrine "'is not an inexorable command that rigidly binds the court to its former decisions, but rather is an expression of good sense and wise judicial practice'") (quoting *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974)). Both the Supreme Court and this Circuit have made clear that reconsideration of a prior holding is not improper if the court is convinced that the prior decision is clearly erroneous and would work manifest injustice. *See Arizona*, 460 U.S. at 619 n. 8, 103 S. Ct. at 1391 n. 8; *Wheeler*, 746 F.2d at 1440 (citing *United States* v. *Robinson*, 690 F.2d 869, 872 (11th Cir. 1982)). Such is the case here. We have explicitly rejected, in both *Motorcity I* and *Motorcity II*, the D.C. Circuit's prior ruling regarding the preemption of the *D'Oench, Duhme* doctrine. We are not, therefore, bound by the "law of the case" doctrine to adhere to a ruling with which we have emphatically and repeatedly disagreed.

C.

Third, Murphy argues that even under current Eleventh Circuit law the *D'Oench, Duhme* doctrine should not be applied in this particular case because, Southeast, unlike the vast majority of FDIC receiverships, generated a $150 million surplus. Murphy suggests that because, under 12 U.S.C. § 1821(d)(11)(B), the bank's shareholders are allowed to divide funds remaining in a receivership pool after the creditors have been paid in full, applying the *D'Oench, Duhme* doctrine in this case would unfairly allow Southeast's shareholders to benefit from Murphy's loss. Murphy contends that allowing the bank's shareholders to divide what remains of his lost investment is contrary to notions of equity.

Murphy can point us to no case law, however, saying or even suggesting that the *D'Oench, Duhme* doctrine does not apply in cases where the receivership has generated a surplus. Rather, Murphy cites cases favoring the use of corporate assets to discharge debts before corporate stockholders are paid. *See Bankers Trust Co.* v. *Florida East Coast Ry. Co.*, 31 F. Supp. 961, 964 (S.D. Fla. 1940) (ordering preferential payment by receivers of defendant railroad of previously entered judgment awarding plaintiff damages for the wrongful death of her husband); *Hoyt* v. *Hampe*, 206 Iowa 206, 214 N.W. 718, 719 (1927) (explaining that "[t]he stockholders of a corporation are not entitled to a distribution of the assets among themselves while corporate debts remain unpaid"). Neither of these cases involve the FDIC as a party, and they do not implicate or shed light on the applicability of the *D'Oench, Duhme* doctrine in cases of surplus.[14]

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[14] The third case Murphy cites in support of his surplus argument, *First Interstate Bank of Texas, N.A.* v. *First National Bank of Jefferson*, 928 F.2d 153 (5th Cir. 1991), also does not involve the *D'Oench, Duhme* doctrine and merely underscores the inapplicability of these cases to the question at hand. In *First Interstate Bank* the court expressly states that "[t]he *D'Oench, Duhme* doctrine protects the FDIC, not a solvent bank.

As we explained in *Motorcity I*, the purpose of the *D'Oench, Duhme* doctrine is to ensure that the FDIC can rely on the records of a failed bank to determine quickly whether to engage in a purchase and assumption transaction, or whether to liquidate the failed bank and pay off insured deposits. *Motorcity I*, 83 F.3d at 1324. "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Motorcity I*, 83 F.3d at 1325. Permitting the doctrine to be overridden if a receivership generates a surplus in the future undermines the doctrine's purpose of enabling the FDIC to make informed and accurate evaluations of a failed bank's assets and liabilities at the outset of the receivership in order to determine the best way to manage the bank's losses. Indeed the rationale of *D'Oench, Duhme* – to protect the FDIC from enforcement of oral agreements against failed financial institutions – is no less compelling if the failed institution eventually generates a surplus. The exception Murphy favors would eviscerate the doctrine. We conclude, therefore, that neither precedent nor the doctrine's purpose counsel in favor of creating an exception to the application of the *D'Oench, Duhme* doctrine for cases in which a receivership generates a surplus.

D.

Finally, Murphy argues that the *D'Oench, Duhme* doctrine is no longer good law because it has been supplanted by the FIRREA. Murphy argues that the Supreme Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L.Ed.2d 67 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed.2d 656 (1997), require such preemption. Our Circuit has already spoken clearly on this issue rejecting precisely this claim.

In *O'Melveny & Myers*, the FDIC, as receiver of a failed

The district court correctly declined to extend the doctrine to this case in which the FDIC is not a party." *Id.*, 928 F.2d at 156.

California savings and loan (S&L), brought a malpractice lawsuit against the savings and loan's former law firm, pleading causes of action under California law for professional negligence and breach of fiduciary duty. *Id.*, 512 U.S. at 82, 114 S. Ct. at 2052. The FDIC alleged that the law firm failed to inform the S&L of the illegal acts of the S&L's controlling officers. *Id.* The law firm defended by arguing that, under California law, knowledge of the conduct of the S&L's controlling officers must be imputed to the S&L, and hence to the FDIC, which, as receiver, stood in the S&L's shoes. Id. The FDIC urged the Court to create a new federal common law rule to govern the imputation of knowledge to the FDIC. *Id.* at 83, 114 S. Ct. at 2052. The Court declined to do so. First, the Court explained that, by statute, California, rather than federal common law, governed imputation of corporate officers' knowledge to the FDIC. The Supreme Court noted that 12 U.S.C. § 1821(d)(2)(A)(i), as amended by the FIRREA, "places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law except where some provision in the extensive framework of FIRREA provides otherwise." *Id.*, at 87, 114 S. Ct. at 2054. Moreover, the Court explained that even if the FIRREA was not applicable in the present case this was not a case "in which judicial creation of a special federal rule would be justified." *Id.* at 87, 114 S. Ct. at 2055.[15]

In *Atherton*, the Resolution Trust Corporation (later replaced by the FDIC) sued several officers and directors of the failed City Federal Savings Bank claiming that they had violated the legal standard of care they owed that federally insured institution. *Id.*, 519 U.S. at 215, 117 S. Ct. at 668. The

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[15] The Court explained that the creation of federal common law was justified only in those limited situations where "there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny*, 512 U.S. at 87, 114 S. Ct. at 2054 (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 1304, 16 L.Ed.2d 369 (1966)).

Supreme Court addressed the question of where courts should look to find the standard of care against which to measure the legal propriety of the defendants' conduct – to state law, to federal common law, or to a provision of the FIRREA, 12 U.S.C. § 1821(k). *Id.* at 215-216, 117 S. Ct. at 669. The district court had held that the federal statute, § 1821, provided the appropriate standard of care. *Id.* at 216, 117 S.Ct. at 669. The Court of Appeals for the Third Circuit reversed holding that the federal statute provided only a baseline level of care but did not prohibit actions resting upon stricter rules originating in either state law or in federal common law. *Id.* at 217, 117 S. Ct. at 669. The Supreme Court vacated the Third Circuit opinion. As an initial matter the Court held that the federal common law corporate governance standards articulated by the Court in *Briggs* v. *Spaulding*, 141 U.S. 132, 11 S. Ct. 924, 35 L. Ed. 662 (1891), did not survive the Court's later decision in *Erie R. Co.* v. *Tompkins*. *Id.*, at 226, 117 S. Ct. at 674. As a result, the Court made clear: "There is no federal common law that would create a general standard of care applicable to this case." *Id.* The Court then went on to consider whether federal statute, 12 U.S.C. § 1821, or state law provided the appropriate standard of care in the case. The Supreme Court held that the federal statute's "gross negligence" standard provided a floor, but did not stand in the way of a stricter state-law standard making directors and officers liable for less egregious conduct. *Id.* at 227, 117 S. Ct. at 674.

In *Motorcity I* and *Motorcity II* we ruled decisively and en banc that the Supreme Court's decisions in *O'Melveny* and *Atherton* did not abrogate our prior holdings regarding the continued viability of the *D'Oench, Duhme* doctrine. We explained that both *O'Melveny* and *Atherton* dealt with the question of whether to create new federal common law in particular areas rather than with the question of whether Congress intended the FIRREA to supplant "the previously established and long-standing federal common law *D'Oench* doc-

trine." *Motorcity II*, 120 F.3d at 1143; *see also Motorcity I*, 83 F.3d at 1330. In *Motorcity II*, our affirmation of the D'Oench, Duhme doctrine in light of the FIRREA and the Supreme Court's decisions in *O'Melveny* and *Atherton* was explicit:

> [W]e decline to accept *Motorcity's* invitation to overrule *D'Oench*. With the *D'Oench* doctrine safely in place as a long-standing federal common law rule, we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States* v. *Texas*,[16] and not that articulated in *Atherton* and *O'Melveny*. We continue to believe that the analysis set forth in our prior en banc opinion reflects the most reasonable reading of Congress's intent – *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.

Id., 120 F.3d 1140, 1144. This panel is bound by the Circuit's prior *en banc* decision. *See Chambers* v. *Thompson*, 150 F.3d 1324, 1326 (11th Cir.1998) (noting that "[w]e are bound to follow a prior panel or *en banc* holding, except where that holding has been overruled or undermined to the

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[16] In *United States* v. *Texas*, 507 U.S. 529, 113 S. Ct. 1631, 123 L. Ed.2d 245 (1993), the Supreme Court noted the "longstanding ... principle that '[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* 507 U.S. at 534, 113 S. Ct. 1631 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294 (1952)). The Court held that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.* (citing *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 2015, 56 L. Ed.2d 581 (1978); *Milwaukee* v. *Illinois*, 451 U.S. 304, 315, 101 S. Ct. 1784, 1791, 68 L. Ed.2d 114 (1981)).

point of abrogation by a subsequent *en banc* or Supreme Court decision").

Therefore, under the *D'Oench, Duhme* doctrine, Murphy has failed to state a claim against the FDIC because he has not alleged a written agreement between Southeast and Orchid establishing their joint venture relationship, the *D'Oench, Duhme* doctrine remains good law in this Circuit, and there is no sound reason not to apply the doctrine in this case. Accordingly, we affirm the district court's order dismissing Murphy's complaint.[17]

AFFIRMED.

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[17] In view of this ruling, we need not address the district court's alternative grounds for dismissal.

Supreme Court, U.S.
FILED
NOV 13 2000

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No. 00-46

IN THE

Supreme Court of the United States

NOV 13 2000

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The federal common-law *D'Oench* doctrine, as expanded by the progeny of *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447 (1942), generally provides federal banking insurers, receivers of failed financial institutions, and their successors-in-interest sweeping protection against unrecorded agreements that might form the basis of a claim or defense. There is a broad and well-recognized circuit split over whether this federal common-law doctrine is viable in light of this Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213 (1997).

The question presented in this case is:

Whether the federal common-law *D'Oench* doctrine constitutes a valid bar to petitioner's claims?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff-appellant below, and petitioner in this court, is Bruce G. Murphy.

The defendant-appellee in the Southern District of Florida and in the Eleventh Circuit, and respondent in this Court, is Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A.

In the District Court for the District of Columbia, the D.C. Circuit, and the Southern District of Florida prior to the substitution of Beck, the defendant-appellee was the Federal Deposit Insurance Corporation, as receiver for Southeast Bank, N.A. (FDIC-Receiver). The FDIC-Receiver is no longer a party to this case and is not a respondent in this Court.

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IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

This case began in the District Court for the District of Columbia. It was appealed to the D.C. Circuit, remanded to the district court, transferred to the Southern District of Florida, and eventually appealed to the Eleventh Circuit. This Court granted certiorari to review the decision of the Eleventh Circuit.

The District Court for the District of Columbia's opinion and order granting summary judgment to then-defendant FDIC-Receiver is published as *Murphy* v. *FDIC*, 829 F. Supp. 3 (D.D.C. 1993), and is reproduced as Appendix B to the Petition (pages B1-B11). The D.C. Circuit's decision reversing the district court is published as *Murphy* v. *FDIC*, 61 F.3d 34

(CADC 1995) ("*Murphy I*"), and is reproduced as Appendix C to the Petition (pages C1-C14). On remand, the D.C. District Court transferred the case to the Southern District of Florida. The transfer order is unpublished and is reproduced as Appendix D to the Petition (pages D1-D2). In May 1998, respondent Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A., was substituted as party defendant for the FDIC-Receiver. The substitution order is unpublished and is reproduced as Appendix E to the Petition (page E1). The District Court for the Southern District of Florida's opinion and order dismissing the complaint is unpublished and is reproduced as Appendix F to the Petition (pages F1-F6). The Eleventh Circuit's decision affirming the district court is published as *Murphy* v. *FDIC*, 208 F.3d 959 (CA11 2000) ("*Murphy II*"), and is reproduced as Appendix A to the Petition (pages A1-A18).[1]

JURISDICTION

The Eleventh Circuit entered its judgment on April 7, 2000. The petition for a writ of certiorari was filed on July 5, 2000, and granted on September 26, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal common-law *D'Oench* doctrine has been partially codified by 12 U.S.C. § 1823(e), as amended, and 12 U.S.C. § 1821(d)(9).[2] These provisions are reproduced as

[1] At respondent's insistence, the opinions of the Eleventh Circuit and the District Courts for the Southern District of Florida and the District of Columbia were again reproduced in the Joint Appendix. Citations in this brief will continue to refer to the Appendices to the Petition (Pet. App.).

[2] Section 1823(e) was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989).

Appendix G to the Petition (pages G1-G2) and Appendix H to the Petition (page H1), respectively.

STATEMENT

1. The federal common-law rule at issue in this case is a mongrel descendant of the rule of equitable estoppel set out by this Court in *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447 (1942). In *D'Oench*, the Federal Deposit Insurance Corporation acting in its corporate capacity (FDIC-Corporate) sued to recover on a note it had acquired in connection with payments it made from the insurance fund to facilitate the transfer of deposit liabilities from a failed bank to a healthy bank.[3] The maker of the note defended on the ground that the bank had agreed not to call the note, although no such agreement appeared in the bank's records.

Looking to a then-existing provision of the Federal Reserve Act criminalizing the false overvaluation of a security to influence any action by the FDIC-Corporate, this Court discerned a "federal policy to protect respondent, and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures or to which it makes loans." 315 U.S. at 457. In light of that policy, this Court held:

> Plainly one who gives such a note to a bank with a secret agreement that it will not be enforced must be presumed to know that it will conceal the truth from the

[3] There is a well-defined dichotomy between the FDIC acting in its corporate capacity and pursuing its own rights as a bank insurer (FDIC-Corporate) and the FDIC acting as a receiver of a failed bank asserting derivative rights on behalf of a bank's creditors and shareholders (FDIC-Receiver). See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994); *Atherton* v. *FDIC*, 519 U.S. 213, 225 (1997); *Gilman* v. *FDIC*, 660 F.2d 688, 690 (CA6 1981). The difference in these separate capacities is quite significant to this case, where respondent is asserting rights that, at best, are derivative from the FDIC-Receiver. See *infra* at 10-11, 13-14, 25-26.

> vigilant eyes of the bank examiners. * * * The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.

Id. at 460. Because the maker of the note "was responsible for the creation of the false status of the note in the hands of the bank," the Court concluded that he was not allowed to plead the "secret agreement" leading to that false status as a defense. *Id.* at 461. Otherwise he "would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible." *Id.*

In 1950, Congress substantially enacted the holding of *D'Oench* as part of a provision relating to purchase and assumption transactions by the FDIC-Corporate. See Federal Deposit Insurance Act of 1950, c. 967, 64 Stat. 873, 889 (Sept. 21, 1950), *codified at* 12 U.S.C. § 1823(e). That provision originally provided that "[n]o agreement which tends to diminish or defeat the right, title or interest of the Corporation [the FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement" satisfied four detailed conditions relating to writing, execution, approval, and recordation.

In 1989, as part of the comprehensive reforms adopted in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), Congress amended 12 U.S.C. § 1823(e) both to expand and to make more precise the federal defense against certain unwritten agreements. FIRREA extended § 1823(e) to agreements tending to diminish or defeat the interest of the FDIC in any asset acquired by it "as receiver"; extended that section to the newly formed Resolution Trust

Corporation (RTC), 12 U.S.C. § 1441a(b)(4); and added comparable protection for "bridge banks," which are transitional entities created to facilitate purchase and assumption transactions, *id.* § 1821(n)(4)(I). FIRREA also added a new provision at 12 U.S.C. § 1821(d)(9)(A), which made § 1823(e) applicable to affirmative claims against the banking authority.

From 1950 to the present, this Court has never explicitly addressed whether the *D'Oench* case has continuing force as a common-law rule of decision separate from § 1823(e). And this Court has only once interpreted § 1823(e), in *Langley* v. *FDIC*, 484 U.S. 86 (1987), providing some indirect insight into the relationship between *D'Oench* and § 1823(e). See *infra* at 18-19. The lower federal courts, however, have taken the limited holding of the *D'Oench* case and run with it in a variety of occasionally conflicting directions. This case presents the question whether several aspects of the mutated *D'Oench* "doctrine" have any federal common-law existence independent of the terms of § 1823(e).

2. On August 18, 1989, petitioner Murphy invested over $500,000 in Orchid Island Associates Limited Partnership ("Orchid") as part of a development project for a golf and beach club in Florida.[4] Over a period of several years extending before and after this investment, Southeast Bank lent Orchid approximately $50 million for the project. Throughout this period Southeast Bank exercised extensive control and direction over the project making Southeast Bank a *de facto* joint venturer with Orchid. As a result of various wrongful activities by Southeast Bank and Orchid, Orchid eventually defaulted on its loans and Southeast Bank fore-

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[4] Unless otherwise noted, the facts are taken from the Eleventh Circuit's opinion, Pet. App. A, which are in turn taken from the allegations of petitioner's amended complaint, which must be accepted as true given the procedural posture of the case. Pet. App. A4.

closed on the property. In 1991, Southeast Bank was declared insolvent and placed into FDIC receivership.

In 1992, Murphy filed suit in the District Court for the District of Columbia against the FDIC as receiver for Southeast Bank. The complaint alleged that Southeast Bank's wrongful actions in concert with Orchid caused the loss of Murphy's investment. The complaint set forth claims for breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation, and securities violations.

The FDIC-Receiver moved to dismiss the complaint, arguing that Murphy's claims were barred by § 1823(e) and, independently, by the federal common-law *D'Oench* doctrine. In particular, the FDIC-Receiver asserted that the *D'Oench* doctrine barred Murphy's claims because liability depended upon the joint misdeeds of Southeast Bank and Orchid, but there was no written agreement memorializing their collusive wrongdoing as a formal "joint venture."

On August 10, 1993, the district court, treating the FDIC's motion as one for summary judgment, granted summary judgment on all counts. Pet. App. B1. The district court ruled that Murphy "cannot recover against Southeast on any theory of an alleged unwritten joint venture agreement pursuant to *D'Oench* * * * and 12 U.S.C. § 1823(e)." Pet. App. B4. Murphy appealed.

On August 1, 1995, the D.C. Circuit, per Judge Ginsburg for himself, Chief Judge Edwards, and then-Judge Wald, reversed. Pet. App. C1. The court held that § 1823(e) did not bar Murphy's claims because those claims did not relate to a specific "asset" acquired by the FDIC, Pet. App. C5, and that this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), "removes the federal common law *D'Oench* doctrine as a separate bar to such claims." Pet. App. C2. As part of a detailed analysis of this Court's *O'Melveny* decision, the D.C. Circuit quoted *O'Melveny*'s statement regarding the

"'extensive framework of FIRREA'" that "'[t]o create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.'" Pet. App. C10.

The D.C. Circuit then applied the reasoning of *O'Melveny* to the federal common-law *D'Oench* doctrine thus:

> [A]lthough the opinion for the Court does not specifically mention *D'Oench*, it does expressly include one of the *D'Oench*-like statutory provisions (§ 1821(d)(9)) in the list of special federal statutory rules of decision from which it infers that "*[i]nclusio unius, exclusio alterius*." *O'Melveny & Myers*, 512 U.S. at --, 114 S. Ct. at 2054. In so doing the Supreme Court, we think, necessarily decided the *D'Oench* question. To translate: the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one.

Pet. App. C10-C11. The D.C. Circuit concluded that "the need for a body of federal common law under the rubric of *D'Oench* has now 'disappeared' and that the district court erred in holding that Murphy's claims are barred under *D'Oench*." Pet. App. C13.

On remand to the district court, the FDIC-Receiver again moved to dismiss petitioner's (amended) complaint on state-law grounds. Motion to Dismiss, June 14, 1996.

On August 21, 1996, the district court, without ruling on the pending motion to dismiss, transferred the case, *sua sponte* and over Murphy's objections, to the Southern District of Florida. Pet. App. D1.

On May 7, 1998, the FDIC-Receiver moved to substitute respondent Jeffrey H. Beck, as Successor Agent for Southeast Bank, as the party defendant in the Southern District of Florida. Motion to Substitute Party Defendant, May 7, 1998. Beck had become the Successor Agent of Southeast Bank when, pursuant to 12 U.S.C. § 197, the FDIC-Receiver had

completed its receivership duties and called a meeting of the shareholders of Southeast Bank to elect an agent to wind up the Bank's affairs. After a series of intervening appointments, Beck – who was also the Chapter 7 trustee for Southeast Banking Corporation and sole shareholder of the Bank – elected himself as the Successor Agent. Motion to Substitute Party Defendant ¶¶ 3-5, at 1-2.

On May 11, 1998, respondent Beck, as Successor Agent for Southeast Bank, was substituted for the FDIC-Receiver as the party defendant. Pet. App. E1.

On July 27, 1998, the District Court for the Southern District of Florida granted the motion to dismiss pending from the District of Columbia. Pet. App. F1. The district court held, *inter alia*, that Murphy's claims were barred by the common-law *D'Oench* doctrine notwithstanding the D.C. Circuit's contrary prior decision in the case. Pet. App. F5-F6. Murphy again appealed.

On April 7, 2000, the Eleventh Circuit, relying exclusively on the common-law *D'Oench* doctrine, affirmed the district court's decision. Pet. App. A1.[5] The court initially rejected Murphy's arguments that the D.C. Circuit's prior decision should control based on either choice-of-law or law-of-the-case principles. Pet. App. A11-A12.

The Eleventh Circuit then held, in reliance on its prior circuit precedent, that the federal common-law *D'Oench* doctrine was good law notwithstanding related statutory provisions amended and added by FIRREA and notwithstanding this Court's decisions in *O'Melveny* and *Atherton*:

> In *Motorcity I* and *Motorcity II* [*Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317 (CA11 1996) (*en banc*), vacated and remanded *sub nom. Hess* v. *FDIC*, 519 U.S. 1087 (1997), reinstated, *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (CA11 1997) (*en banc*), cert. denied *sub nom. Hess* v. *FDIC*, 523 U.S. 1093 (1998)] we * * * * explained that both *O'Melveny* and *Atherton* dealt with the question of whether to create new federal common law in particular areas rather than with the question of whether Congress intended the FIRREA to supplant "the previously established and long-standing federal common law *D'Oench* doctrine." *Motorcity II*, 120 F.3d at 1143; *see also Motorcity I*, 83 F.3d at 1330.

Pet. App. A16-A17. The Eleventh Circuit also rejected Murphy's argument that the *D'Oench* doctrine was inapplicable where a receivership has generated a substantial profit ($150 million) and hence the only persons (inequitably) benefiting from application of the doctrine – and from Murphy's loss – were the Bank's shareholders rather than the FDIC. Pet. App. A13-A14. The court accordingly held that the *D'Oench* doctrine "remains good law" in the Eleventh Circuit and was applicable to this case. *Id.* A18.

Murphy timely petitioned for a writ of certiorari, which this Court granted on September 26, 2000.

SUMMARY OF ARGUMENT

1. Federal common law is a disfavored creature, limited to exceptional circumstances demanding a federal rule of decision but lacking a federal statute to provide one. This Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213 (1997), establish the standards governing the availability off federal common law rules for the benefit off the FDIC acting in its capacity as a receiver of a failed financial institution. Those cases confirmed that the interests pursued by the FDIC-Receiver are not those of the United States, and thus do not create one of those "'few and restricted instances'" where

[5] The court expressly declined to reach two other grounds given by the district court for the dismissal. Pet. App. A18 n.8. Those other grounds, while in petitioner's view frivolous, would remain open on remand.

federal common law might be justified. *O'Melveny*, 512 U.S. at 87 (citation omitted); *Atherton*, 519 U.S. at 225. Those cases also established that FIRREA, by comprehensively addressing the rights of the FDIC-Receiver, left no room or justification for federal common law, but rather left unaddressed matters "subject to the disposition provided by state law." *O'Melveny*, 512 U.S. at 85.

Under the approach and holdings of *O'Melveny* and *Atherton*, there is no valid federal common-law *D'Oench* doctrine applicable to this case. Any supposed federal interests of the FDIC-Receiver or its private successor in this case are no stronger than, and are in fact much weaker than, the interests rejected in *O'Melveny* and *Atherton*. The only interests at stake are the purely private interests of the Bank's shareholders. Even apart from FIRREA, therefore, the evolved federal common-law *D'Oench* doctrine invoked in this case is invalid. That conclusion is only confirmed by the 1989 enactment of FIRREA. The detailed provisions governing which parties and what claims are subject to the statute's *D'Oench*-like protections leave no room for federal common law. *Inclusio unius, exclusio alterius*.

2. There is no basis for avoiding the limitations of *O'Melveny* and *Atherton* in the supposed fact that they dealt with the creation of new federal rules rather than the displacement of old ones. Any supposed presumption that statutes do not intend to displace existing federal common law does not apply to federal common law that is invalid even aside from inferences drawn from subsequent congressional action. Furthermore, such a presumption does not displace the *O'Melveny* and *Atherton* analyses. Both of those cases relied upon earlier cases from this Court that had displaced pre-existing federal common law, and *Atherton* itself dealt with a common-law rule that had been applied by federal courts for over one hundred years. And as applied in this case, the evolved common-law rule invoked by respondent was neither longstanding nor well established when FIRREA

was adopted, hence no saving presumption would even apply. Finally, even applying a presumption of retention, that presumption is more than overcome given that FIRREA spoke directly to the issues addressed by the *D'Oench* doctrine.

ARGUMENT

I. THERE IS NO VALID FEDERAL COMMON LAW GOVERNING THE RIGHTS OF THE FDIC-RECEIVER OR ITS PRIVATE SUCCESSORS.

The decision below depends entirely upon the proposition that federal common law protects the FDIC-Receiver and, derivatively, its private successors, from claims related to unrecorded agreements. But such federal common law has never *validly* existed and, even if it had, it would not have survived the enactment of FIRREA in 1989.

A. *O'Melveny* and *Atherton* Govern Invocations of Federal Common Law by the FDIC-Receiver or Its Private Successors.

The basic principles controlling this case were set out by this Court in its unanimous decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). In prosecuting a state-law malpractice action, the FDIC-Receiver sought to rely on a federal common-law rule to bar a state-law estoppel defense based upon imputed knowledge of the alleged wrongdoing. Under alternative analyses, this Court rejected the FDIC-Receiver's invocation of federal common law.

Starting with the fundamental proposition – established in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), but apparently lost on the FDIC – that "'[t]here is no federal general common law,'" 512 U.S. at 83, this Court held that state law, "not federal law, governs the imputation of knowledge to corporate victims of alleged negligence." *Id.* at 84-85. Regarding the further question whether such imputed knowledge could be charged to the FDIC-Receiver, this Court again rejected the application of federal common law.

Noting the FDIC-Receiver's reliance on *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), for the proposition that "federal law governs questions involving the rights of the United States arising under nationwide federal programs," the Court observed that the "FDIC is not the United States," and that, even if it were, the Court could not assume that the FDIC "was asserting its own rights rather than, as receiver, the rights of" the bank in receivership. 512 U.S. at 85. Nor did the case involve one of those "'few and restricted'" instances "where there is a 'significant conflict between some federal policy or interest and the use of state law.'" 512 U.S. at 87 (quoting *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963); *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). "Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict." 512 U.S. at 87-88.

The rules at issue did "not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred," and there was not even "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity." *Id.* at 88. There was likewise no federal interest in avoiding the supposed depletion of the deposit insurance fund because "there is no federal policy that the fund should always win," and this Court had previously rejected similar "'more money' arguments." *Id.* This Court also disposed of the FDIC-Receiver's theory that application of state law would "'disserve the federal program,'" finding it a "facile approach to federal-common-law-making" that "demonstrates the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id.* at 89.

In addition to the generic assertion of federal interests, the FDIC-Receiver had claimed that FIRREA "positively authorized federal common law." *Id.* at 87. Not only did the

Court reject this contention, it held that FIRREA actually confirmed the absence of federal common law. Noting that 12 U.S.C. § 1821(d)(2)(A)(i) places the FDIC-Receiver into the shoes of the insured depository institution, the Court then held that those further "provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver" – notably including § 1821(d)(9) – "demolished" the argument that FIRREA demonstrated a "high federal interest" sufficient to justify use of federal common law. 512 U.S. at 86. The added rights expressly granted to the FDIC-Receiver, this Court ruled, can be neither "supplemented [nor] modified by federal common law. * * * *Inclusio unius, exclusio alterius*." *Id.* Referring to the "extensive framework of FIRREA," this Court stated that "[t]o create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* at 87. Instead of inviting federal common law, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85.

Whether judged on the law either before or after FIRREA, the conclusion was the same: The FDIC-Receiver may not invoke federal common law to defeat claims or defenses involving the rights of a bank in receivership. *Id.* at 87.

Three years after *O'Melveny*, this Court again rejected the FDIC-Receiver's invocation of federal common law in *Atherton* v. *FDIC*, 519 U.S. 213 (1997). Regarding the applicable standard of care for officers and directors of a federally chartered savings association being sued by the FDIC-Receiver, this Court held that FIRREA set the minimum standard and rejected "a pre-existing judge-made federal common-law standard" invoked by the FDIC-Receiver to fill the space above that minimum standard. 519 U.S. at 225. Analyzing the validity of the asserted federal common-law standard – which had been created by this Court and applied by the lower courts for over 100 years – this Court held that *Erie* had eliminated the general basis for the rule and that the rule

did not fall within the otherwise exceedingly narrow category of valid federal common law. See generally 519 U.S. at 218-19 (reviewing *O'Melveny* and the cases considered therein, and concluding that application of state law did not create a sufficient conflict with or threat to federal interests such as might justify federal common law). In rejecting various alleged federal interests, the Court noted significantly that, as in *O'Melveny*, "the FDIC is acting only as receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer." *Id.* at 225. Given that prior cases had declined to recognize federal common law where the asserted interests were "at least as strong as, if not stronger than, those present[ed]" by the FDIC-Receiver, the Court concluded that there "is no federal common law that would create a general standard of care applicable to this case." 519 U.S. at 226.

O'Melveny and *Atherton* set the standard for analyzing efforts by the FDIC-Receiver to invoke federal common law. Applying those standards to this case, there still "is no federal common law" that applies for the benefit of either the FDIC-Receiver or respondent as its private successor.

B. The *D'Oench* Doctrine Is Invalid As Applied To the FDIC-Receiver or Its Private Successors.

As in *O'Melveny* and *Atherton*, the first question to consider here is whether, aside from FIRREA, there even validly exists a federal common-law rule of decision applicable to respondent as the private successor to the FDIC-Receiver. Thereafter, this Court would consider whether FIRREA had any further implications concerning the existence or validity of any federal common-law rule that might govern this case.

No Federal Interest Justifying Federal Common Law. There is nothing exceptional about claims against the estate of a bank in receivership or thereafter that implicates a federal interest sufficient to draw the federal courts into the task of lawmaking. Even when the FDIC-Receiver was still a party

to this case, there was no question that it was "acting only as a receiver of a failed institution" and was "not pursuing the interest of the Federal Government as a bank insurer." *Atherton*, 519 U.S. at 225; see *O'Melveny*, 512 U.S. at 85. And as the case came to the Southern District of Florida and the Eleventh Circuit, even the FDIC-Receiver had left the scene, having completed its duties and, pursuant to 12 U.S.C. § 197, returned the substantial remaining estate of Southeast Bank to respondent as the Successor Agent elected by and acting for the benefit of the shareholders. While even the direct involvement of the FDIC-Receiver is insufficient to support a federal common-law rule, the current dispute affects only the shareholders of the Bank and petitioner Murphy, and does not even remotely implicate significant federal interests. Neither a need for uniformity, nor the deposit insurance fund, nor the proper operation of a federal program is in any way affected by the competing private claims in this case. And assertions of such effects would be inadequate in any event, as both *Atherton* and *O'Melveny* have established in contexts far more compelling than this case. *Atherton*, 519 U.S. at 219-20; *O'Melveny*, 512 U.S. at 88.

The Eleventh Circuit made no effort to identify federal interests or to analyze the validity of the *D'Oench* doctrine as applied in this case. Instead it merely cited to its prior decisions in *Motorcity I* and *Motorcity II* for the overly broad claim that the *D'Oench* doctrine constituted "'previously established and long-standing federal common law.'" Pet. App. A16 (quoting *Motorcity II*, 120 F.3d at 1143). But the age of the initial *D'Oench* case – the holding of which is limited to defenses against collection on assets held by the FDIC-Corporate and hence does not apply here – is beside the point and establishes neither the age nor the legitimacy of its overreaching offspring, the *D'Oench* doctrine as applied by the courts below. And even in the *Motorcity* opinions, the Eleventh Circuit offered nothing remotely resembling a significant federal interest that would be applicable to this case. Rather,

it asserted that the *D'Oench* case itself involved a "'uniquely federal interest[],'" expanded its assertion to claim that "the previously-established federal common-law *D'Oench* doctrine * * * operates in an area of special federal concern as recognized by Congress, the Supreme Court, and the lower federal courts," and thus concluded that the "*O'Melveny* analysis does not apply." *Motorcity I*, 83 F.3d at 1328, 1330. Despite these bold assertions, the nature of any significant federal interest beyond the confines of the original *D'Oench* case, much less beyond the scope of the specific statutory provisions, remains a mystery. Having thus blinked the issue of the validity apart from FIRREA of the *evolved D'Oench* doctrine, the Eleventh Circuit then dismissed the impact of FIRREA by applying a presumption favoring the retention of such common law. *Id.*

After *Motorcity I* was vacated and remanded by this Court for reconsideration in light of *Atherton*, the Eleventh Circuit again misconceived the issue of whether the *D'Oench* doctrine was a valid application of federal common law, focusing instead on the fact that the initial *D'Oench* case post-dated this Court's decision in *Erie*. *Motorcity II*, 120 F.3d at 1143. But once again, the court's approach to federal common law was too "facile." *O'Melveny*, 512 U.S. at 89. Petitioner seriously doubts whether even the narrow *D'Oench* case raised interests sufficient to justify federal common law under current standards, much less survived as federal common law in light of its 1950 codification. But even if it did, that does not answer whether its wayward *extensions*, never endorsed by this Court, are valid. No interest identified by the Eleventh Circuit justifies those extensions and the displacement of state law beyond the scope of the 1950 statute and the original *D'Oench* case.[6]

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[6] Petitioner believes that the *D'Oench* case itself was preempted by the 1950 statute, which spoke directly and comprehensively to the issue originally addressed by this Court. While *D'Oench* is certainly relevant to inform courts as to the meaning of the statutory terms adopted in 1950, see *Langley* v. *FDIC*, 484 U.S. 86, 92-93 (1987), there is no indication that it carries further force beyond the language of the statute. This Court need not reach the viability of the *D'Oench* case itself, which does not apply to the facts here. But if it elects to reach that logically prior issue, the 1950 demise of the narrower *D'Oench* case *a fortiori* would invalidate the subsequent expansion of the doctrine by the lower federal courts in precisely the same manner as in *Atherton* the invalidity, after *Erie*, of the earlier *Briggs* case eliminated all subsequent applications of that line of federal common law in the lower federal courts.

Furthermore, even the basic interests underlying *D'Oench* itself do not support the rule asserted in this case. There is no credible suggestion that petitioner "lent himself" to the secret agreement between Southeast Bank and Orchid, *D'Oench*, 315 U.S. at 460, or that he was in any position to have insisted that such agreement be put in writing. Petitioner was the victim of, not a participant in, the collusive behavior in this case. Conspirators generally do not reduce their conspiracy to writing, and their victims can hardly demand otherwise. The interest in *D'Oench* of encouraging written agreements and deterring secret ones thus has no application here. If anything, disallowing the type of claim in this case has the exact opposite effect, encouraging such collusion by reducing the consequences. Whatever the merits of the alleged interests in *D'Oench* itself, they are not implicated here, and consequently "the *scope* of judicial displacement of state rules" falls well short of this case. *O'Melveny*, 512 U.S. at 87 (emphasis added).

The extremely limited circumstances justifying the application of federal common law simply do not exist, and have never existed, under the circumstances presented by this case. As this Court has noted, "absent some congressional authorization to formulate substantive rules of decision, federal common law exists *only* in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and

admiralty cases." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).[7] This case involves none of those limited areas and hence there is no federal common law to be applied.

FIRREA Negates Any Possible Federal Common Law. The detailed provisions of FIRREA both confirm the absence of federal common law to begin with and would in any event negate any existing federal common law. While not address-

[7] Petitioners believe that the quoted statement from *Texas Industries* should be the outer limits of federal common law. Both *O'Melveny* and *Atherton*, however, use language suggesting a further, though extremely narrow, policy-based justification for federal common law. *O'Melveny*, 512 U.S. at 88 (discussing absence of any "significant conflict with an identifiable federal policy or interest"); *Atherton*, 519 U.S. at 218 (discussing conflict with federal policy as narrow potential basis for common law). Such independent judicial promotion of supposed federal policy goals (at the expense of state law) is troubling at a minimum, *O'Melveny*, 512 U.S. at 89, and raises difficult separation-of-powers and federalism problems. Indeed, even where directed by Congress, the exercise by the judiciary of such derivative authority, other than in certain traditionally judicial realms such as sentencing or remedies, could raise concern under the nondelegation doctrine. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 390-91 (1989) (discussing the "role that the Judiciary always has played, and continues to play, in sentencing"); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992) ("[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court"). The doctrine of constitutional doubt thus should weigh against construing a federal statute as authorizing judicial lawmaking without an express affirmative indication of such authorization, and should preclude the finding of such authorization based upon mere inference. Where the operative provisions of a statute do not go as far as some aspirational policy statement or legislative history might otherwise have suggested they go, that merely demonstrates the presence of competing, though perhaps unspoken, policy concerns that constrain the more flowery aspirations. Legislative compromise and other checks often temper the full implementation of sweeping principles or policies. Federal courts have no constitutional authority to tinker with the legislative results merely because, among the competing interests at stake, some supposedly preferred interest might be better served by doing so.

ing *D'Oench* by name, the use of § 1821(d)(9) as the basis for its application of the "*inclusio unius, exclusio alterius*" principle more than covers that ground.[8] Furthermore, FIRREA was quite detailed regarding to whom and how far its *D'Oench*-like protections would extend. For example, FIRREA extended the previous statutory protections to the FDIC-Receiver, the RTC, and bridge banks, and extended the coverage, at least for the FDIC, to certain affirmative claims. See 12 U.S.C. §§ 1823(e), 1441a(b)(4), 1821(n)(4)(I), 1821(d)(9). This detailed legislative treatment of the effectiveness of unwritten agreements suggests that Congress extended protection to such parties and such claims as it thought proper, and declined to go further. Allowing federal common law to proceed where Congress has chosen to stop "is not to 'supplement' this scheme, but to alter it." *O'Melveny*, 512 U.S. at 87.

The preemptive inferences from FIRREA are further supported by this Court's pre-FIRREA decision in *Langley* v. *FDIC*. Interpreting the word "agreement" in the 1950 version of § 1823(e), this Court looked to the *D'Oench* case, but only as "the leading case in this area prior to enactment of § 1823(e) in 1950." 484 U.S. at 92. *D'Oench* was used exclusively as support for and confirmation of the otherwise permissible meaning of the word "agreement," and there was no suggestion that either *D'Oench* or its progeny could extend any protection beyond the statutory terms themselves. That the Court viewed the statute as the final word in the area, to the seeming exclusion of federal common law, can be seen toward the end of the opinion, where it stated:

> The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). *An agreement that meets them prevails* even if the FDIC did

[8] And, as the D.C. Circuit noted in *Murphy I*, this "Court was specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the *D'Oench* doctrine." Pet. App. C10.

> not know of it; and an agreement that does not meet them fails even if the FDIC knew. *It would be rewriting the statute to hold otherwise.*

Id. at 95 (emphasis added). This passage, anticipating virtually identical sentiments in *O'Melveny*, suggests that the federal common-law *D'Oench* doctrine did not separately survive even its 1950 codification. With this case fresh in its memory, Congress made detailed revisions and additions to that codification, thus more certainly defining its choices, and leaving still less room for any supposed federal common law.

Further (though perhaps unintentional) corroboration that FIRREA shut the door on any putative federal common law comes from the behavior of the FDIC-Receiver itself, which suggests that in the wake of FIRREA there is not even a colorable federal interest in a continued common-law supplement. As the FDIC-Receiver has argued to this Court in opposition to petitions for certiorari, it has adopted a policy under which it claims it will not invoke the common-law *D'Oench* doctrine as to any transaction arising after FIRREA's enactment. *See* Br. for the FDIC in Opp. at 6-7, *Noel* v. *FDIC*, No. 99-655 (*cert. denied*, -- U.S. --, 120 S. Ct. 935 (2000)) (claiming that the FDIC will assert *D'Oench* only as to transactions preceding the August 9, 1989, enactment of FIRREA); Br. for the FDIC in Opp. at 10, *Hess* v. *FDIC*, No. 97-1025 (*cert. denied*, 523 U.S. 1093 (1998)) (same).[9] It is hardly credible for private parties such as respondent here to claim an overriding federal interest when its predecessor, the FDIC-Receiver, feels no such interest in or need for federal common law.

Under the controlling principles of *O'Melveny* and *Atherton*, there simply does not exist any valid federal common

[9] Policy Statement Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (1997).

law that applies in this case. The progeny of the *D'Oench* case were not, and certainly are not now, good law.

II. THERE IS NO BASIS FOR AVOIDING THE RULE OF *O'MELVENY* AND *ATHERTON*.

The Eleventh Circuit disregarded *O'Melveny* and *Atherton* by claiming that those cases dealt only with the creation of *new* federal common law, but did not apply to pre-existing federal common law. It then argued that FIRREA did not displace the common-law *D'Oench* doctrine because statutes that invade the common law are presumed to leave long-established principles intact absent an evident purpose to the contrary, citing *United States* v. *Texas*, 507 U.S. 529, 534 (1993). But the general policy favoring preservation of the common law does not alter the application of *O'Melveny* or *Atherton* in this case.

First, invalid federal common law is not presumed to be preserved by congressional action. Second, *O'Melveny*, *Atherton*, and their precursors apply to pre-existing as well as newly minted federal common law. And any favorable presumption applicable to federal common law is far weaker for policy-based applications of federal common law than it is for core federal common law involving the rights of the United States, disputes between states, or admiralty. Third, the mutations of the *D'Oench* doctrine invoked in this case were neither longstanding nor well established in 1989, hence they do not trigger any presumption of retention. Fourth, even assuming that Congress must have spoken directly to the issues in order to overcome any applicable presumption, it has. Congress in FIRREA directly addressed the effectiveness of parole agreements, and consequently displaced any federal common law, whether old or new.

A. Invalid Federal Common Law Is Not Presumed Retained, Regardless of Its Age.

In holding that FIRREA did not displace the supposed common law asserted in this case, the Eleventh Circuit merely

assumed the validity of the mutated *D'Oench* doctrine based on the age of the *D'Oench* case, and then cited to its prior decisions in *Motorcity I* and *Motorcity II*. Pet App. A16-A17. But as both *O'Melveny* and *Atherton* teach, the valid scope of any federal common law is not to be assumed. And as the previous section illustrated, any extension of the *D'Oench* doctrine to this case – involving an affirmative claim, unrelated to any asset of the Bank, defended first by the FDIC-Receiver and now by a private successor agent – is not valid regardless of the age or validity of the more limited *D'Oench* case itself. As in *Atherton*, invalid federal common law, even if old, is not available to fill any space left open by FIRREA. Such space is to be filled by state law. *Atherton*, 519 U.S. at 218.

B. *O'Melveny* and *Atherton* Both Apply To Pre-Existing Federal Common Law.

The analyses in *O'Melveny* and *Atherton* were not limited to whether federal common law should be newly created as opposed to retained from some prior existence. While *O'Melveny* arguably involved a request for a "new" rule, it nonetheless relied upon cases finding displacement of pre-existing federal common law. See *O'Melveny*, 512 U.S. at 85 (citing *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981); *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981)).

Thus, in *Milwaukee* v. *Illinois*, this Court stated that "when Congress addresses a question *previously governed by a decision rested on federal common law* the need for such an unusual exercise of lawmaking by federal courts disappears. * * * [The Court's] commitment to the separation of powers is too fundamental to *continue* to rely on federal common law * * * when Congress has addressed the problem." 451 U.S. at 314-15 (emphasis added and internal quotations omitted); see also *Northwest Airlines*, 451 U.S. at 84 nn.10 & 11 (discussing weight of authority in the lower federal courts supporting the federal common-law right of a contribution ultimately re-

jected by the Court). There is simply no basis for asserting that *Texas* somehow represents a departure from this long line of cases and thereby renders *O'Melveny* inapplicable.

In *Atherton*, the federal common-law rule being pressed by the FDIC-Receiver was over 100 years old, and even though it was created by this Court before *Erie*, the lower courts had continued to apply it throughout the remainder of the century. 519 U.S. at 220 (citing subsequent cases applying *Briggs*); *FDIC* v. *Mason*, 115 F.2d 548, 551-52 (CA3 1940); see also R. Stevens & B. Nielson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether Section 1821(k) Preempts Federal Common Law*, 13 Ann. Rev. Banking L. 169, 173-74 (1994) ("Before the adoption of FIRREA, a consensus existed among federal courts that * * * federal law alone governed * * * the issue of officers' and directors' liability" for federally chartered S&Ls). Again, there was no suggestion that such post-*Erie* application of federal common law in the lower courts somehow raised the bar for displacement or otherwise voided the *O'Melveny* analysis.[10]

Furthermore, it is highly doubtful that *Texas* established a standard in any way different from its predecessors, many of which were cited in both *O'Melveny* and *Atherton*. Thus, the "speaks[s] directly" test set forth in *Texas*, 507 U.S. at 534, is the virtually identical verbal formulation set out in numerous

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[10] It is no answer to *Atherton* to say that the original *Briggs* decision at issue was itself invalid after *Erie* whereas the *D'Oench* decision came after *Erie* and remains good law. The original *D'Oench* decision does not apply to this case, and probably did not independently survive its codification in 1950, when that case was still a pup. See *supra* at 4, 15-16 n.6. As for any subsequent evolution of the *D'Oench* doctrine in the lower courts since 1950, this Court has never endorsed such developments, they are no different than the post-*Erie* applications of the *Briggs* rule at issue in *Atherton*, and they are not entitled to any presumption of validity or preservation without much more.

prior cases. See *Milwaukee* v. *Illinois*, 451 U.S. at 315 ("the question [in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)] was whether the legislative scheme 'spoke directly to a question' – in that case the question of damages – not whether Congress had affirmatively proscribed the use of federal common law"); *Northwest Airlines*, 451 U.S. at 95 n.34 ("once Congress addresses a subject, even a subject previously governed by federal common law * * * the task of the federal courts is to interpret and apply statutory law, not to create common law"); *Mobil Oil*, 436 U.S. at 625 (courts may not supplement a statute when an Act "does speak directly to a question"). This Court in *O'Melveny* cited those cases using the same language, and hence it is simply wrong to suggest that a different standard should now apply merely because it did not also cite the *Texas* case. Compare *O'Melveny*, 512 U.S. at 85 (citing *Northwest Airlines* and *Milwaukee*) with *Texas*, 507 U.S. at 534 (citing *Mobil Oil* and *Milwaukee* for the "speak directly" formula).[11]

Finally, any presumption as applied to federal common law is of limited utility in cases such as this one, where there is considerable existing state law to consider as well, and hence presumptions regarding displacement or preservation will tend to cut both ways. As this Court has noted, "Congress acts * * * against the background of the total *corpus juris* of the states." *Wallis*, 384 U.S. at 68 (citation and quotation marks omitted). Outside of the core areas of federal

[11] Insofar as there may be a perceived difference in the rigor of the analysis in *Texas* as opposed to some other cases, such a difference can be explained by the fact that the common-law rule at stake in *Texas* went to the very heart of federal common law, involving the rights of the United States itself as against the several States. Furthermore, the preemptive inference would have led to extremely unusual results in *Texas* that were not to be lightly reached. Neither circumstance is present here, and hence there is no basis for applying any supposedly greater vigor in an effort to preserve a federal common-law rule regarding private rights where Congress has legislated on the issue at length.

common law where one would be hard pressed to find properly applicable state law, policy-based federal common law typically acts precisely to displace otherwise applicable state law. To read a statute as preserving federal common law thus necessarily reads it as allowing the displacement of state law.[12] Such a reading should be disfavored because the presumption in favor of preserving state law from federal displacement is considerably stronger than any presumption applicable to federal common law.

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" * * * [I]n cases such as the present "we start with the assumption" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

Milwaukee, 451 U.S. at 316-17 (citation omitted); see also *Texas*, 507 U.S. at 534 ("a different standard applies when analyzing the effect of federal legislation on state law" than in the case of federal common law). Indeed, "the very concerns about displacing state law which counsel against finding pre-emption of state law in the absence of clear intent actually suggest a willingness to find congressional displacement of federal common law." *Milwaukee*, 451 U.S. at 317 n.9.

[12] In this case, for example, applying a federal common-law rule would displace state law rules regarding what establishes a *de facto* joint venture (or conspiracy), vicarious liability between such venturers, and the use of parole evidence to demonstrate concerted action and liability to third parties injured thereby. *Bryce* v. *Bull*, 143 So. 409, 411-12 (Fla. 1932); *Florida Tomato Packers, Inc.* v. *Wilson*, 296 So. 2d 536, 539-40 (Fla. Dist. Ct. App. 1974), *cert. denied*, 327 So.2d 32 (Fla. 1976).

Whatever the presumption concerning federal common law in areas where state law has nothing to say, that presumption is either weakened or non-existent where federal common law would displace state law. This is just such a case.

C. The Common-Law Rules Asserted in This Case Are Neither Longstanding Nor Well Established.

Even assuming, *arguendo*, that the difference between *Texas* and *O'Melveny* turns on the age and familiarity of the common-law rule in question, the rule being asserted in this case was neither aged nor familiar in 1989 when FIRREA was enacted. While the original *D'Oench* decision – applicable to the FDIC-Corporate and limited in a variety of ways – is indeed long in the tooth, the many new extensions of the *D'Oench* doctrine applied in this case lack the common-law credentials of the original decision.[13]

For example, the first time a court of appeals seems to have squarely confronted and ruled upon whether the *D'Oench* doctrine should be extended to the FDIC-Receiver was not until 1978; over thirty-five years after the original *D'Oench* case. See *FDIC* v. *First Nat'l Fin. Co.*, 587 F.2d 1009, 1012 (CA9 1978) (rejecting the argument that the *D'Oench* doctrine does not apply to the FDIC-Receiver). Compare *FDIC* v. *Meo*, 505 F.2d 790, 793 (CA9 1974) (suggesting that *D'Oench* does not apply to the FDIC-Receiver). And the issue remained quite unsettled prior to and even after FIRREA, with various courts finding that the FDIC-Receiver remained subject to state law. See *FDIC* v. *British-Am. Corp.*, 744 F. Supp. 116, 119 (E.D.N.C. 1990) (noting that prior to 1989 amendment, protection of *D'Oench* doctrine "not available when the FDIC appears as receiver for the failed bank"); *In re Jeter*, 48 B.R. 404, 410 (Bankr. N.D. Tex. 1985) ("FDIC, as receiver of a national bank, is simply a successor in interest of the bank and takes title to the bank's claims against its debtors subject to all defenses which are good against the bank."); see also *In re Anjopa Paper & Bd. Mfg. Co.*, 269 F. Supp. 241, 253 (S.D.N.Y. 1967) ("Generally, the receiver of a national bank takes title to the bank's claims against its debtors subject to all the existing rights and equities."); *Trigo* v. *FDIC*, 847 F.2d 1499, 1503 n.4 (CA11 1988) ("While federal law controls the rights and liabilities of the FDIC-Corp., state law controls the FDIC when the agency is acting as receiver of a failed bank."). Though later cases also went the other way, see *FSLIC* v. *Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1277 & n.15 (CA11 1989) (holding, shortly after FIRREA, that *D'Oench* doctrine protects the FDIC-Receiver, and rejecting *Trigo* as dicta), there was no uniform view and this Court had never resolved the issue.

In similar fashion, the further extension of the *D'Oench* doctrine to private successors of the FDIC does not seem to have been decided in the courts of appeal until December 1989 – *after* the enactment of FIRREA in August of that year. See *FDIC v. Newhart*, 892 F.2d 47, 49 (CA8 1989) (applying *D'Oench* to purchaser of notes from FDIC-Corporate, though seemingly based upon state law grounds). And the Eighth Circuit in that case described the unpublished district court cases that had previously reached the same result as "essentially assertions without detailed reasoning, so as to have no persuasive force." *Id.* at 50 n.3. Such a ringing non-endorsement of the pre-FIRREA state of the federal common-law rule being invoked in this case shows that such law was neither longstanding nor well established.

The extension of the *D'Oench* doctrine to affirmative claims, as opposed to defenses against asset collection, also was a more recent development. See *Beighley* v. *FDIC*, 676 F. Supp. 130, 132 (N.D. Tex. 1987) (in a § 1823(e) case, holding that to "allow a claim against the FDIC asserting the very grounds that could not be used as a defense to a claim by the FDIC is to let technicality stand in the way of principle."),

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[13] And even the *D'Oench* case itself could claim no great age in 1950 when § 1823(e) was first enacted, and hence any presumption against displacement of that narrower common-law rule would not have applied.

on reh'g, 679 F. Supp. 625 (N.D. Tex. 1988), *aff'd*, 868 F.2d 776 (CA5 1989). And even so, the extension seems primarily to have been a means to prevent circumvention of the rule as applied to asset collection: Allowing a defendant in a collection suit merely to rename a contractual defense as a counterclaim for breach of contract would indeed have been troubling. But that "asset"-based approach does not establish the acceptance or longevity of a common-law rule barring no-asset affirmative claims such as those raised by petitioner.[14]

The uncertain legal terrain in 1989 rebuts any notion that the common-law rules invoked here could escape displacement by FIRREA. "Before we can apply this reluctance to infer legislative abrogations of the common law, however, we must determine what that terrain was – or at least how it might have been perceived – when Congress acted; Congress cannot think it necessary, and we should not expect it, to state clearly an intent to abrogate a common-law rule that does not exist." *Texas*, 507 U.S. at 541 (Stevens, J., dissenting).

But even apart from any uncertainty, the most salient feature of the evolved common-law rules applied in this case is the absence of any support from this Court for those multifarious extensions of the original *D'Oench* case. Petitioner submits that the proper measure of whether a federal common-law principle is sufficiently well established to receive any favorable presumption should turn not on the occasional rulings of the lower federal courts, but rather upon the consistent rulings of *this* Court. Cf. *Astoria Fed. Sav. & Loan Ass'n.* v. *Solimino*, 501 U.S. 104, 108 (1991) (supporting the notion that preclusion rules are "well established" by citing Supreme Court cases spanning a period of almost forty years); *Texas*, 507 U.S. at 533 (citing three Supreme Court

[14] There is a tremendous difference between blocking the collection of an asset of the receivership, thus reducing the estate, and pursuing a successful no-asset claim, which simply puts the claimant in line with the other creditors awaiting a share of whatever assets will remain after higher priority recipients are paid.

cases dating back as many as fifty years as the basis for the longstanding common-law rule that was preserved). In the present case, there is not a single ruling of this Court that would support the extension of *D'Oench* to the facts of petitioner's claim. Absent such a ruling, the common law invoked by respondent cannot be viewed as well established and cannot qualify for an inference that would overcome the authority of *O'Melveny* and *Atherton*.

D. Any Requirement That a Statute Speak Directly To the Issue In Order To Preempt the Evolved *D'Oench* Doctrine Is Amply Satisfied.

As a final matter, even under the "speaks directly" test invoked by respondent and the Eleventh Circuit, both the 1950 Act and FIRREA satisfy that test. The issue to which a statute must directly speak is the general one regarding the effectiveness of oral agreements, not the presence or absence of federal common-law authority. *Milwaukee*, 451 U.S. at 315.

Here, there is no serious question that the 1950 Act spoke directly to the subject covered by the *D'Oench* case, and effectively codified the rule of that case. See *Langley*, 484 U.S. at 92. FIRREA likewise spoke quite specifically to the issue of which parties were entitled to the bar against reliance on unrecorded agreements and what claims or defenses would be subject to that bar. See *supra* at 18.[15]

Furthermore, there is no doubt that Congress may "speak directly" to an issue via the *inclusio unius, exclusio alterius*

[15] The Eleventh Circuit's search for something more to demonstrate a specific congressional intent to abrogate federal common law, see *Motorcity II*, 120 F.3d at 1144 n.6, simply ignores this Court's opinion in *Milwaukee*, which rejected any such requirement and noted that federal law was preempted where Congress addressed the general issue. 451 U.S. at 315 (discussing *Mobil Oil*). Requiring further specificity in the "issue" required to be addressed by Congress in order to displace federal common law would do violence to the separation-of-powers principles that restrain the creation of federal common law to begin with.

principle, as evidenced by this Court's decision in *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952), a case squarely relied upon in the later *Texas* case. *Texas*, 507 U.S. at 534. In *Isbrandtsen*, this Court held that despite "several early lower court decisions which allowed a set-off against a seaman's suit for wages," subsequent "legislation passed by Congress for the protection of seamen, beginning in 1872, has now covered this field." 343 U.S. at 781. It reached this conclusion because, while not mentioning set-offs in the statute,

> Congress has gone so far in expressly listing such deductions and set-offs that it is a fair inference that those not listed may not be made. It thus remains for the courts to determine only what are the deductions or set-offs for derelictions of duty that are listed by Congress, rather than to determine which of the deductions or set-offs once known to the general maritime law Congress has failed to exclude. Congress, in effect, has excluded all of them except those which it has listed affirmatively.

Id. at 789; see also *Astoria Fed.*, 501 U.S. at 110 (statute "carries an implication that the federal courts should recognize no preclusion," previously recognized in federal common law). Of course, *O'Melveny* engaged in precisely such *inclusio unius, exclusio alterius* analysis, and cited the statutory codification of the *D'Oench* doctrine as an example of why a largely *separate* defense was excluded. *O'Melveny*, 512 U.S. at 86-87. Where the alleged common-law defense at issue is substantially the same as the statutory defense, the inference of exclusion is orders of magnitude stronger and more than sufficient to satisfy the "speaks directly" test. The *O'Melveny* analysis is thus fully consistent with *Texas* and its predecessors and dispositive of the present case.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eleventh Circuit and remand for further proceedings.

Respectfully submitted,

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DEC 13 2000

No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for the Southeast Bank, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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The Respondent, Jeffrey H. Beck, as successor agent for Southeast Bank, N.A., respectfully requests this Court to affirm the Eleventh Circuit's decision in all respects.

STATEMENT OF THE CASE

Murphy's amended complaint in the District Court for the District of Columbia alleges that he invested approximately $500,000 in Orchid Island Associates Limited Partnership (Orchid) as a limited partner in 1989. App. 3. According to the complaint, Murphy was solicited by Orchid to make his investment and he did so in reliance on false representations of his potential return on the investment. App. 4-6.

Southeast Bank (Southeast) loaned Orchid approximately $50 million between August 1988 and January 1990. App. 3-4. Murphy's complaint alleged that Southeast either "knew, acted recklessly with respect to, and/or should have known of the fraudulent representations and activities" by Orchid's principals. App. 7. Murphy further alleged that "Southeast's involvement and control . . . of Orchid was so extensive and complete as to constitute Southeast a de facto partner, co-agent of, and joint venturer with . . . Orchid." App. 8. Murphy claims that "Southeast's conduct constituted total dominion over the development such as to deprive Orchid of its own will, rendered Orchid subservient to the interests and directions of Southeast," thus establishing an independent legal obligation owed by Southeast to Orchid and Murphy separate and apart from the relationship created by the loan documents. App. 16. Murphy listed a plethora of alleged wrongful acts and omissions by Orchid between 1988 and 1991, all of which acts led to Orchid's ultimate inability to meet its loan obligations to Southeast. App. 3-20.

On August 2, 1991, Southeast brought a foreclosure action against Orchid. App. 19. Southeast was declared insolvent on September 19, 1991, and the Federal Deposit Insurance Corporation (FDIC), as receiver, sold the Orchid loans to First Union National Bank of Florida, N.A. (First Union). *Id.* The Orchid project was sold by First Union at a foreclosure

sale on May 27, 1993. *Id.* According to the complaint, Murphy's investment in Orchid is "worthless" and the FDIC, as receiver, "is in possession of a large surplus." App. 19 and 20.

In the District Court for the District of Columbia, the FDIC moved to dismiss several of the counts under the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and 12 U.S.C. § 1823(e). Pet. App. B3. The district court granted the FDIC's motion, *id.* at B4-B9, and the Court of Appeals for the D.C. Circuit reversed that ruling, holding that the *D'Oench* doctrine had been preempted by the 1989 adoption of 12 U.S.C. § 1821(d)(9). *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995). Following the D.C. Circuit's remand, the district court, on its own motion, transferred Murphy's action to the Southern District of Florida. Pet. App. D. Following the transfer, the FDIC moved to substitute Jeffrey H. Beck, as Successor Agent for Southeast as the party defendant "in the place and stead of the FDIC, which was previously the Receiver of [Southeast]." Pet. App. E1.[1] Thereafter, the district court ruled on the FDIC's previously-filed motion to dismiss. App. 49-54.[2]

The court first ruled that Murphy could not state a cause of action against the FDIC. App. 52-54.[3] Then, in accordance with

1. As noted in the Brief for Petitioner at 7-8, Beck was appointed the Successor Agent upon completion of the FDIC's receivership duties.

2. Murphy's amended complaint, to which reference has been made in the text, was filed after the D.C. Circuit's decision. App. 51.

3. Addressing Murphy's claim that a joint venture relationship had existed between Southeast and Orchid, the district court noted that "there are no documents creating a joint venture between Southeast and Orchid" and that the loan agreements "expressly reject a joint venture." App. 52. The court accordingly concluded that "[n]o joint venture existed between Southeast and Orchid." *Id.* The court also rejected Murphy's argument that, as a third party, he could "establish the existence of a joint venture or de facto partnership relationship notwithstanding a purported disclaimer of a joint venture between the alleged joint venturers." App. 53. Indeed, the court remarked that

(Cont'd)

Eleventh Circuit precedent, the district court applied the *D'Oench* doctrine to bar Murphy's claim. App. 53-54. The court held that "absent a written document," Murphy cannot state a claim against the FDIC based on "transactions that do not appear on the bank's books." *Id.*

The Eleventh Circuit elected to address only the *D'Oench*-based ground for dismissal. App. 56-59.[4] After addressing at some length — and rejecting — Murphy's attempt to argue that the Eleventh Circuit should apply the law of the D.C. Circuit to address the *D'Oench* issue,[5] the Eleventh Circuit rebuffed Murphy's argument that this Court's decisions in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 519 U.S. 213 (1997), require a holding that *D'Oench* has been supplanted by the 1989 adoption of 12 U.S.C. § 1823(e) and 1821(d)(9), relying on the controlling *en banc* decision in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998). App. 68-72.

SUMMARY OF ARGUMENT

Born of the Great Depression and annealed in the savings and loan crisis of the 1980s, the *D'Oench* doctrine has withstood the test of time as a hardy common-law principle. Reduced to its essence, the doctrine forbids the use of a secret agreement, *i.e.*, one not maintained in the ordinary records of a financial institution, as a basis either to defend against a claim brought

(Cont'd)

"Murphy, by virtue of his investment, was a limited partner in Orchid" and therefore "a party to, and bound by, the agreements" between Southeast and Orchid. *Id.* Additionally, the court determined that Murphy had failed to allege the existence of a joint venture under Florida law. *Id.*

4. As Murphy correctly notes, the other grounds relied on by the district court for dismissal "would remain open on remand." Brief for Petitioner at 8 n.5.

5. The correctness of the Eleventh Circuit's ruling on this point was not raised in the certiorari petition and is not before this Court.

by the FDIC (or another federal banking regulatory agency) or to bring an affirmative claim against the agency. The dual public policies effectuated by the doctrine are: (i) maintaining public confidence in the banking system (particularly in times of economic upheaval) and (ii) ensuring that the FDIC readily and quickly can ascertain the financial status of an insolvent institution when making the critical decision whether to liquidate the institution or sell the assets to another institution. Because the FDIC's decision must be made with great dispatch, often overnight, protecting the FDIC from defenses or claims based upon agreements that are not reflected in the bank records is of paramount importance.

The *D'Oench* doctrine was partially codified in 1950, and there has never been even a suggestion that the Congress intended to supplant or discard the doctrine in that statutory enactment. The doctrine lay dormant until the late 1970s, when the first signs of the growing savings and loan crisis began to appear, and came into its own as an essential component of regulatory law as that crisis escalated in the 1980s. *D'Oench* protection was extended to the FDIC in its receivership capacity, to the FSLIC, and to transferees or assignees of those agencies. Because barring defenses arising from secret agreements is essentially meaningless if parties can bring affirmative claims against the FDIC based upon such agreements, it became universally accepted that *D'Oench* barred such claims. During this turbulent period, there was never any question but that *D'Oench* and its statutory analogue, 12 U.S.C. § 1823(e), were to be construed in tandem so as to serve the dual purposes of the doctrine.

With the enactment of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) in 1989, the Congress elected to leave unaltered the substance of Section 1823(e) as that statute had originally been enacted in 1950, with one important expansion — the inclusion of the FDIC in its receivership capacity. *D'Oench* protection was also extended to "bridge banks" and to the newly-created Resolution Trust Corporation (RTC). Many of the other refinements and

interpretations of *D'Oench* were incorporated in a new provision, 12 U.S.C. § 1821(d)(9)(A), into which the Congress codified the common-law prohibition on affirmative claims against the FDIC based upon secret agreements that do not pass muster under Section 1823(e).

The Congress, however, did not elect to expand the scope of Section 1823(e). Thus, the statutory language limiting its application to "specific assets" acquired by the FDIC or RTC was left unchanged. Also, the Congress did not address the question whether assignees or transferees are within the scope of Sections 1823(e) or 1821(d)(9)(A). A conflict quickly arose among the Circuits on the question whether *D'Oench* survived FIRREA, with the D.C. Circuit ruling that the enactment of Section 1821(d)(9)(A), the absence of any indicium of Congressional intent notwithstanding, had eradicated the doctrine, *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995), and the Eleventh Circuit applying the presumption announced in *United States v. Texas*, 507 U.S. 529 (1993), to conclude that *D'Oench* survives FIRREA, *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (*en banc*), *vacated and remanded, sub nom. Hess v. FDIC*, 519 U.S. 1087 (1997), *on remand*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998). A minority of the other Circuits have chosen one course or the other, but most have not yet addressed the issue squarely.

Murphy's efforts to turn the Court away from the *Texas* presumption are unavailing. *D'Oench* cannot be seen as anything other than a proper, and long-established, federal common-law doctrine that cannot be deemed to have been carelessly overlooked or lightly discarded by the Congress, particularly in the absence of any ascertainable legislative intent to do so. There is neither precedential nor historical support for Murphy's passing argument that the 1950 enactment of Section 1823(e) eviscerated *D'Oench*, so that the question can be transformed into whether this Court should promulgate a hitherto-unknown

common-law principle. In the absence of clear Congressional intent to preempt the common-law *D'Oench* doctrine, the presumption that the doctrine survives must prevail.

Finally, Murphy's assertions that *D'Oench* survives in only its most minimalist incarnation, *i.e.*, as a doctrine applicable only to the FDIC in its corporate capacity and only to bar defenses based upon written agreements, should readily be rejected. When this Court announces a principle of federal common law, as it unmistakably did in the *D'Oench* decision, it does so with the sure and certain understanding that the common law is not static and immutable. The courts of appeals, confronted with a bewildering array of disputes arising from the failures of financial institutions in the 1980s and early 1990s, carefully molded and shaped the doctrine, impelled to a very significant extent by this Court's declaration of the policy goals of the doctrine in *Langley v. FDIC*, 484 U.S. 86 (1987). There is no principled basis upon which to parse the doctrine and proclaim that certain parts survive, while others do not, and the Court should not accept Murphy's invitation to do so.

ARGUMENT

I. The *D'Oench* Doctrine.

A. The Derivation of the Doctrine.

Four years after declaring in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that "[t]here is no federal general common law," *id.* at 78, this Court created the federal common-law doctrine that a "secret agreement" that is not maintained in a bank's records does not operate as a defense against a suit by the FDIC to recover on a note. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 460 (1942). The Court discerned the existence of "a federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans."

315 U.S. at 457.[6] The FDIC was created in 1933, *see* Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168, to "safeguard the deposits of the general public and increase public trust in the banking system" after the disastrous bank runs and bank failures during the early years of the Great Depression. J. Michael Echevarria, *A Precedent Embalms a Principle: The Expansion of the D'Oench, Duhme Doctrine*, 43 CATH. U. L. REV. 745, 752-54 (1994) (hereinafter *Expansion of D'Oench*). The Court declared the existence of a "federal policy evidenced in this Act to protect [the FDIC], a federal corporation, from misrepresentations made to induce or influence the action of [the FDIC], including misstatements as to the genuineness or integrity of securities in the portfolio of banks which it insures or to which it makes loans." *D'Oench*, 315 U.S. at 459.

The dispute in *D'Oench* arose from the sale of bonds by D'Oench, Duhme & Co. to the Belleville Bank & Trust Co., which bonds later went into default. 315 U.S. at 454. D'Oench provided the bank with "accommodation notes," *i.e.*, notes that would not be called, for the purpose of keeping the past due bonds from appearing among the bank's assets. When the FDIC acquired the notes as part of collateral securing a $1 million

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6. Section 12B(s) of the Federal Reserve Act, 12 U.S.C. § 264(s) (1935), punished as a criminal offense the making of "any statement, knowing it to be false, or willfully overvalu[ing] any security" for the purpose of "obtaining any loan" from the FDIC or "influencing in any way" an action of the FDIC. *D'Oench*, 315 U.S. at 446-47 (quoting 12 U.S.C. § 264(s)). The Court relied on the pellucid federal policy of that statute and on its prior decision in *Deitrick v. Greaney*, 309 U.S. 190 (1940). There, the Court had applied another criminal banking statute to prohibit a bank director from defending against a receiver's claim under a note based upon an alleged "secret and illegal agreement" that the bank would not demand payment on a note. *Id.* at 196 ("it is enough for present purposes that the respondent, after placing his note among the bank's receivables . . . as the means for avoiding the consequences of violation of the statute, may not now take the benefit of the secret and illegal agreement that his note except for purposes of deceiving the bank examiners was to be regarded as a nullity").

loan made by the FDIC in connection with an assumption of the bank's deposit liabilities by another institution, it brought an action against D'Oench to recover on the notes. 315 U.S. at 453-54. While agreeing that D'Oench had not acted to deceive the FDIC in providing the accommodation notes (because the FDIC had not been created at the time of the transaction), and that no criminal offense had occurred, the Court held that "the inability of an accommodation maker to plead the defense of no consideration does not depend on his commission of a penal offense." 315 U.S. at 460. Rather, announcing the principle that has informed the precedents for the last 58 years, the Court held:

> The test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled. . . . It needs no argument to demonstrate that the integrity of ostensible assets has a direct relation to solvency. . . . The federal policy expressed in the Act . . . is not dependent on proof of loss or damage caused by the fraudulent practice.
>
> Though [D'Oench] was not a participant in this particular transaction and, so far as appears, was ignorant of it, nevertheless it was responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert that the federal policy to protect [the FDIC] against such fraudulent practices should not bar its defense to the note. . . . If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible. . . .

Id. at 460-62.

In announcing this rule, the Court was fully aware of *Erie's* limitations. Indeed, Justice Frankfurter, in his concurring opinion, argued that the dispute should have been resolved under state law, rather than as a matter of federal common law. 315 U.S. at 463-65 (Frankfurter, J. concurring). Justice Jackson spoke directly to the question:

> Although by Congressional command this case is to be deemed one arising under the laws of the United States, no federal statute purports to define the Corporation's rights as a holder of the note in suit for the liability of the maker thereof. There arises, therefore, the question whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our law from materials found in common-law sources.
>
> This issue has a long historical background of legal and political controversy as to the place of the common law in federal jurisprudence. . . . The federal courts have no general common law, as in a sense they have, no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.
>
> I do not understand Justice Brandeis's statement in *Erie R. Co. v. Tompkins*, that "There is no federal general common law," to deny that the

> common law may in proper cases be an aid to or the basis of decision of federal questions. In its context it means to me only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except "where the Constitution, treaties, or statutes of the United States [so] require or provide.". . . .
>
> Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

315 U.S. at 468-70 (Jackson, J. concurring) (citations and footnote omitted). This Court's subsequent decisions noted *D'Oench* as a valid declaration of federal common-law principles. *E.g., United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947); *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945).[7]

B. The 1950 Amendments to the Federal Deposit Insurance Act.

1. The enactment.

Eight years after *D'Oench*, the Congress amended the Federal Deposit Insurance Act, *see* Pub. L. No. 81-797, § 2, 64 Stat. 873, 879 (1950), to, among other things, create the provisions of 12 U.S.C. § 1823(e) (1950):

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution an official record of the bank.

12 U.S.C. § 1823(e) (1982).[8]

7. Neither this Court nor the courts of appeals, however, had immediate occasion to apply *D'Oench* as a substantive rule of law. It appears that the only reported decision applying the *D'Oench* principle between 1942 and 1970 is the Third Circuit's decision in *FDIC v. Alker*, 151 F.2d 907 (3d Cir. 1945), *cert. denied*, 327 U.S. 799 (1946). *See Expansion of D'Oench, supra* at 771 & n.178.

2. The effect of the statute.

Section 1823(e) had the effect of making the common-law principles of *D'Oench* "both more encompassing and more precise." *FDIC v. O'Neil*, 809 F.2d 350, 353 (7th Cir. 1987). The statute is narrower because it is applicable only to specific assets of an insolvent institution, but it is broader because it applies regardless of the customer's blameworthiness. *E.I. du Pont de Nemours & Co. v. FDIC*, 32 F.3d 592, 597 (D.C. Cir. 1994); *FDIC v. Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985); *FDIC v. Blue Rock Shopping Center, Inc.*, 766 F.2d 744, 753 (3d Cir. 1985); *Expansion of D'Oench, supra* at 769-70. Moreover, Section 1823(e) did not apply to the FDIC in its receivership capacity, to the Federal Savings and Loan Insurance Corporation (FSLIC), or to transferees of assets from banking regulatory agencies. Given the paucity of legislative history, the lack of any limitation based upon relative culpability, and

8. As originally enacted, Section 1823(e) included a provision authorizing the FDIC to engage in purchase and assumption transactions. 12 U.S.C. § 1823(e) (1950). This provision was moved to another section of Title 12 by the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 112, 92 Stat. 1469. The version of Section 1823(e) quoted in the text reflects the 1982 amendment. In 1994, the statute was reorganized and the quoted text was renumbered as Section 1823(e)(1). *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 317, 108 Stat. 2160, 2223. Because the statute existed as Section 1823(e) at all times pertinent to this case, it will be so designated in this brief.

the absence of an estoppel element, Section 1823(e) is perhaps best seen as a "prophylactic rule making certain agreements strictly unenforceable and can be viewed as a federal statute of frauds and corporate authority requirement." *Expansion of D'Oench, supra* at 770-71 (footnote omitted). The legislative history of the 1950 Act was silent on the status of *D'Oench*, an omission that influenced the federal courts to conclude that Congress had not preempted *D'Oench* in 1950. *FDIC v. McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986); *In re NBW Commercial Paper Litigation*, 826 F. Supp. 1448, 1459 (D.D.C. 1992).[9]

C. The Development of the Doctrine (1980-89).

1. Overview.

With the onset of the savings and loan crisis in the early 1980s, the courts of appeals were called upon to address the scope of the *D'Oench* doctrine. As the wave of insolvencies crested, the overarching public policy concern was that the FDIC must be able readily to discern the institution's financial status upon stepping in after a declaration of insolvency by the Comptroller of the Currency. *Langley v. FDIC*, 484 U.S. 86, 91-92 (1987). This is so because the FDIC has two alternatives for dealing with an insolvent institution: (i) liquidation, which has the disadvantage of "weaken[ing] confidence in the banking system" and causing "substantial delay in returning funds to depositors"; and (ii) the "preferred option" of a purchase and assumption agreement, whereby "the FDIC, in its capacity as receiver, sells the bank's healthy assets . . . in exchange for the purchasing bank's promise to pay the failed bank's depositors,"

9. The FDIC's chairman testified before the House of Representatives Committee on Banking and Currency, during the hearings on the 1950 amendments, that the proposed legislation "may be characterized as a codification of the law pertaining to the Federal Deposit Insurance Corporation." Amendments to Federal Deposit Insurance Act, 1950: Hearings on S. 2822 Before the House Comm. on Banking and Currency, 81st. Cong., 2nd Sess. 19 (1950) (statement of Maple T. Harl, Chairman FDIC).

sells "the 'bad' assets to itself acting in its corporate capacity," and "[w]ith the money it receives, . . . pays the purchasing bank enough money to make up the difference between what it must pay out to the failed bank's depositors." John B. Shumadine, *Striking a Balance: Statutory Displacement of Established Federal Common Law and the D'Oench Doctrine in Murphy v. F.D.I.C. and Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 51 ME. L. REV. 129, 144 (1999) (hereafter *Striking a Balance*). If the FDIC opts for a purchase and assumption, the transaction must necessarily be "consummated with great speed." *Gunter v. Hutcheson*, 674 F.2d 862, 865-66 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

2. Interpretations of *D'Oench*.

Because the precise provisions of Section 1823(e) failed adequately to protect the FDIC against secret agreements, the *D'Oench* doctrine, enjoying a resurgence, provided the federal courts with the necessary tools to do so. First, making explicit an assumption that had existed since at least 1945, *see FSLIC v. Kearney Trust Co.*, 151 F.2d 720, 725 (8th Cir. 1945), the doctrine was made applicable to the FSLIC. *E.g., FSLIC v. Two Rivers Associates, Inc.*, 880 F.2d 1267, 1274-75 (11th Cir. 1989); *Mainland Savings Association v. Riverfront Associates, Ltd.*, 872 F.2d 955, 956 (10th Cir.), *cert. denied*, 493 U.S. 890 (1989); *Firstsouth, F.A. v. Aqua Construction, Inc.*, 858 F.2d 441, 442 (8th Cir. 1988); *Andrew D. Taylor Trust v. Security Trust Federal Savings and Loan Association*, 844 F.2d 337, 342 (6th Cir. 1988).[10] The doctrine was also extended to the FDIC and to the FSLIC in their receivership roles.

10. The FSLIC was created in 1934 as part of the Federal Home Loan Bank Board. *See* National Housing Act, Pub. L. No. 73-479, § 402, 48 Stat. 1246, 1256 (1934). The FSLIC's role was to insure depositors' accounts in qualifying savings and loan associations. *Id.* at § 403, 48 Stat. at 1257. With the advent of the FIRREA, the FSLIC was abolished, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 401(a), 103 Stat. 183, 354, and the RTC assumed the FSLIC's existing receiver/conservator duties. 12 U.S.C. § 1441a(1).

E.g., FSLIC v. Two Rivers Associates, 880 F.2d at 1277; *FDIC v. McClanahan,* 795 F.2d at 516. Finally, the federal courts extended protection to "bridge banks," *e.g., Bell & Murphy and Associates v. Interfirst Bank Gateway, N.A.,* 894 F.2d 750, 754-55 (5th Cir.), *cert. denied,* 498 U.S. 895 (1990); *Kilpatrick v. Riddle,* 907 F.2d 1523, 1528 (5th Cir. 1990), *cert. denied,* 498 U.S. 1083 (1991), and to other third parties who acquire assets from the FDIC or the FSLIC. *E.g., Newton v. Uniwest Financial Corp.,* 967 F.2d 340, 347 (9th Cir. 1992); *Porras v. Petroplex Savings Association,* 903 F.2d 379, 381 (5th Cir. 1990); *Federal Land Bank of Jackson v. Shaffett,* 757 F. Supp. 22, 23-24 (M.D. La. 1991).[11]

Section 1823(e) did not define the scope of secret agreements to which the *D'Oench* doctrine applied, thus leaving it to the courts to address an ever-increasing variety of secret agreements as the savings and loan crisis worsened. Because "any other result would nullify the doctrine," *Kilpatrick v. Riddle,* 907 F.2d at 1528 (citation omitted), the courts of appeals extended protection under the *D'Oench* doctrine to affirmative claims, either in tort or contract, brought against either the FSLIC or the FDIC. *E.g., Robinowitz v. Gibraltar Savings,*

11. As will be discussed in the forthcoming analysis of the 1989 banking statutes, virtually all of these common-law applications of *D'Oench* have been codified, with the exception of the doctrine's applicability to successors in interest. While Murphy's primary challenge to the application of *D'Oench* appears to be premised upon the notion that a "private successor" should not be permitted to invoke the *D'Oench* doctrine, Brief for Petitioner at 14-18, it is a mere accident of timing that Beck, as a successor agent, was before the Eleventh Circuit and is now before this Court defending the dismissal of Murphy's complaint. Murphy brought his claims *against the FDIC* in 1992, following the failure of Southeast. App.2. The litigation proceeded to the D.C. Circuit's decision, *Murphy v. FDIC,* 61 F.3d 34 (D.C. Cir. 1995), and the subsequent transfer to the Southern District of Florida, following which transfer Beck was appointed as successor agent. Beck thus stands in the FDIC's shoes on the question whether Murphy validly could bring his action against the FDIC.

23 F.3d 951, 955 (5th Cir. 1994), *cert. denied,* 513 U.S. 1078 (1995); *OPS Shopping Center, Inc. v. FDIC,* 992 F.2d 306, 309-10 (11th Cir. 1993); *Newton,* 967 F.2d at 344; *Reding v. FDIC,* 942 F.2d 1254, 1259 (8th Cir. 1991); *Timberland Design, Inc. v. First Service Bank for Savings,* 932 F.2d 46, 49-50 (1st Cir. 1991); *Victor Hotel Corp. v. FCA Mortgage Corp.,* 928 F.2d 1077, 1083 (11th Cir. 1991).[12]

The scope of the *D'Oench* doctrine, prior to the enactment of the 1989 banking statutes, is perhaps best stated as follows:

> [A] private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

OPS Shopping Center, 992 F.2d at 308 (citation omitted).[13] The driving force behind these decisions is the recognition that any other result would erode the doctrine by "let[ting] technicalities stand in the way of principle." *Hall v. FDIC,* 920 F.2d 334, 340 (6th Cir. 1990) (citation omitted), *cert. denied,* 501 U.S. 1231 (1991). The FDIC cannot be assumed to be aware of unmemorialized agreements when it evaluates an institution's fiscal soundness to determine whether the institution should be liquidated or sold under a purchase and assumption agreement. The disallowance of affirmative claims against the FDIC, arising from such secret agreements, is essential to preserve the FDIC's

12. The primary articulated exception to this application of *D'Oench* is that so-called "free standing tort claims," that "do not implicate the records of regular banking transactions," may be brought against the FDIC as receiver of an insolvent institution. *OPS Shopping Center,* 992 F.2d at 310-11. That exception has not been asserted by Murphy.

13. Although decided in 1993, the *OPS Shopping Center* decision did not address the FDIC's arguments under the 1989 statutes but decided the dispute "on the basis of the common law *D'Oench* doctrine." *Id.* at 309 n.3.

ability to carry out its statutory role. *RTC v. Dunmar Corp.*, 43 F.3d 587, 592 (11th Cir.) (*en banc*), *cert. denied*, 516 U.S. 817 (1995).

3. *Langley v. FDIC.*

Many of the decisions cited above draw guidance from this Court's decision in *Langley v. FDIC*, 484 U.S. 86 (1987), this Court's single foray into the *D'Oench* doctrine since the 1942 announcement of that decision. *Langley* arose from a loan by the Planters Trust & Savings Bank (Planters), a Louisiana institution insured by the FDIC. *Id.* at 88. The loan was secured by a note, a mortgage and personal guarantees. *Id.* Three years after the loan, Planters brought an action in state court for nonpayment under the note and the Langleys removed the suit to federal court based upon diversity. *Id.* The case was consolidated with an action brought by the Langleys against Planters, seeking damages and alleging (in a mirror image of one of their defenses against the bank) that Planters had misrepresented the size and value of the property purchased with the loan proceeds. *Id.* at 88-89. "No reference to these representations appears in the documents executed by the Langleys, in the bank's records, or in the minutes of the bank's board of directors or loan committee." *Id.* at 89.

The bank was declared insolvent in 1984 and the FDIC was appointed as receiver. 484 U.S. at 89. Under a purchase and assumption transaction, Planters' deposit liabilities and assets were assumed by another institution and the FDIC obtained, among other things, the Langleys' note. *Id.* The FDIC was thereafter substituted as a plaintiff in the action originally brought by Planters and obtained a summary judgment in its favor. *Id.* at 89-90. The case came before this Court in 1987, under the then-existing provisions of 12 U.S.C. § 1823(e) (1982). *Id.* at 90. The Langleys sought to preserve their action and defenses on the basis that "the word 'agreement' in [Section 1823(e)] encompasses only an express promise to perform an act in the future." *Id.*

The Court first looked to general commercial principles to ascertain the proper interpretation of the word "agreement":

> As a matter of contractual analysis, the essence of petitioners' defense against the note is that the bank made certain warranties regarding the land, the truthfulness of which was a condition to performance of their obligation to repay the loan. As used in commercial and contract law, the term "agreement" often has "a wider meaning than . . . promise," and embraces such a condition upon performance. The Uniform Commercial Code, for example, defines agreement as "the bargain of the parties in fact as found in their language or by implication from other circumstances. . . ." Quite obviously, the parties' bargain cannot be reflected without including the conditions upon their performance, one of the two principal elements of which contracts are constructed. It seems to us that this common meaning of the word "agreement" must be assigned to its usage in § 1823(e) if that section is to fulfill its intended purposes.

Id. at 90-91 (citations omitted).

In language that guided the federal courts in their application of both the statute and the common-law doctrine, the Court explicated:

> One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities, and when the FDIC is deciding whether to liquidate a failed bank or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank. The last kind of evaluation, in particular, must be made "with great speed, usually overnight, in order to preserve the

going concern value of the failed bank and avoid an interruption in banking services." Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

A second purpose of § 1823(e) is implicit in its requirement that the "agreement" not merely be on file and in the bank's records at the time of an examination, but also have been executed and become a bank record "contemporaneously" with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. These latter requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. Neither purpose can be adequately fulfilled if an element of a loan agreement so fundamental as a condition upon the obligation to repay is excluded from the meaning of "agreement."

Id. at 91-92 (citations omitted).

Finally, the Court turned to *D'Oench* to inform its construction of the statute:

> That "agreement" in § 1823(e) covers more than promises to perform acts in the future is confirmed by examination of the leading case in this area prior to enactment of § 1823(e) in 1950. In *D'Oench, Duhme & Co. v. FDIC*, the FDIC acquired a note in a purchase and assumption transaction. The maker asserted a defense of failure of consideration (that is the failure to perform a promise that was a condition precedent to the maker's performance), based on an undisclosed agreement between it and the failed bank that the note would not be called for payment. The Court held that this "secret agreement" could not be a defense to suit by the FDIC because it would tend to deceive the banking authorities. The Court stated that when the maker "lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled," that scheme or arrangement could not be the basis for a defense against the FDIC. We can safely assume that Congress did not mean "agreement" in § 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of *the leading case applying that term to FDIC-required notes. . . .*

Id. at 92-93 (citations omitted; emphasis added).

Langley provided much of the impetus for subsequent applications of the *D'Oench* doctrine. *E.g., Victor Hotel Corp.*, 928 F.2d at 1082 (*D'Oench* and *Langley* "immunize the FSLIC against defenses such as fraudulent inducement and misrepresentation"); *Kilpatrick*, 907 F.2d at 1527-28 (*Langley* establishes that "borrowers who execute facially unqualified obligations may not prevent a federal receiver's collection efforts by claiming that they were induced to execute the obligations by fraud"). In *Robinowitz v. Gibraltar Savings*, 23 F.3d 951 (5th Cir. 1994), the Fifth Circuit applied *Langley* to bar the plaintiff's claim against the RTC for breach of fiduciary duty by the insolvent institution:

> Robinowitz's claim is analogous to one for fraudulent inducement which is barred by *D'Oench, Duhme*. In *Langley*, the plaintiffs claimed that the Bank fraudulently induced them to borrow funds to invest in property by orally misrepresenting the size of the property. The Court held that the oral misrepresentation regarding the nature of the property was sufficient to constitute an "agreement" within the meaning of § 1823. It then held that even if the

> misrepresentation was fraudulent, § 1823 still barred a claim based on the representation unless it met the recording requirements. Robinwitz's claim that an oral misrepresentation fraudulently induced him to enter the settlement agreement, like the Langleys' claim that the bank's oral misrepresentation regarding the property induced them to borrow funds, is also barred by *D'Oench Duhme*.

23 F.3d at 955-56 (citations omitted). Similarly, in *OPS Shopping Center*, the Eleventh Circuit found support in *Langley* for barring an action against the FDIC based upon a letter of credit issued by the failed institution's president but never recorded in the files, records or board minutes of the bank. 992 F.2d at 308-09.[14]

II. FIRREA, *O'Melveny & Myers, Atherton v. FDIC, And Motorcity:* The *D'Oench* Doctrine After 1989.

A. The 1989 Statutes.

As the savings and loan industry continued to suffer devastating setbacks, the Congress undertook, in FIRREA, to shore up "public confidence in the savings and loan industry in order to insure a safe, stable, and viable system of affordable housing finance." H.R. REP. R. NO. 101-54(I) at 307 (1989), *reprinted in* 1989 U.S.C.C.A.N. 87, 103. The Congress streamlined the regulatory provisions, eliminated the FSLIC, expanded the FDIC's powers to include all insured depository institutions, and amended Section 1823(e) to protect the FDIC when acting as receiver. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, §§ 201, 212, 217, 103 Stat. 183, 188, 221, 254.[15] Section 1823(e) otherwise remained

14. Following its creation in 1989, the RTC also availed itself of *D'Oench* to bar affirmative claims, "whether sounding in contract or tort, when they are premised on an unwritten agreement." *Sweeney v. RTC*, 16 F.3d 1, 4-5 (1st Cir.), *cert. denied*, 513 U.S. 914 (1994).

15. The RTC's responsibility under FIRREA was to assume responsibility for thrifts that had been placed into conservatorship or (Cont'd)

substantively unchanged. 12 U.S.C. § 1823(e) (1990) (extending statute to FDIC "as receiver of any insured depository institution"); 12 U.S.C. § 1821(n)(4)(I) (extending statute to "bridge banks").

In 12 U.S.C. § 1821(d)(9)(A), the Congress partially codified the post-*Langley* precedent that had allowed the FDIC to invoke *D'Oench* as a defense against affirmative claims. Section 1821(d)(9)(A) provides that "any agreement which does not meet the requirements set forth in Section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the [FDIC]." The obvious intent was to "expand the protection given the FDIC when it acquires assets following a bank failure." *Striking a Balance, supra* at 151 n.158. Substantively, however, Section 1821(d)(9)(A) merely incorporated Section 1823(e) as a defense to claims against the FDIC.

B. *O'Melveny & Myers.*

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), the Court undertook to decide whether, in an action by the FDIC "as receiver of a federally insured bank, it is a federal-law or rather a state-law rule of decision that governs the tort liability of attorneys who provided services to the bank." *Id.* at 80-81. The FDIC's claims against the law firm for professional negligence and breach of fiduciary duty were based upon California law. *Id.* at 82-83. The FDIC sought to apply a federal common-law rule to the question "whether the knowledge of corporate officers acting against the corporation's interest will be imputed to the corporation." *Id.* at 83. Alternatively, if California law applied, the FDIC sought to apply federal common law to "the more narrow question whether knowledge by officers so acting will be imputed to the FDIC when it sues as receiver of the corporation." *Id.* (footnote omitted).

(Cont'd)
receivership (between January 1989 and December 1995) and the RTC accordingly was granted powers similar to those conferred on the FDIC. 12 U.S.C. § 1441a(b)(4)(A).

The Court rejected, as "plainly wrong," the notion that there should be "a special federal common-law rule divesting States of authority over the entire law of imputation." 512 U.S. at 83 (citation omitted). Addressing the question whether federal common-law should preempt the application of California's imputation law "to the FDIC suing as receiver," the Court held that "this is not one of those cases in which judicial creation of a special federal rule would be justified." *Id.* at 85, 87.

The FDIC asserted that FIRREA itself established the federal court's authority to promulgate common-law rules. 512 U.S. at 86.[16] The Court rejected the FDIC's argument that FIRREA "can be supplemented or modified by federal common law," observing that "[t]his argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." 512 U.S. at 86 (citations omitted). Among the provisions identified as having created "special federal rules of decision" is 12 U.S.C. § 1821(d)(9), which section is described by the Court as "excluding certain state-law claims against FDIC based on oral agreements by the S&L." *Id.* There follows the invocation of *inclusio unius, exclusio alterius, id.* at 86 (in which Murphy seeks to find support for his position, see Brief for Petitioner at, *e.g.*, 10-13). The Court observed that "[t]o create *additional* 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." 512 U.S. at 87 (emphasis added). Nonetheless, because the FDIC's predecessor receiver, the FSLIC, had been installed as receiver in 1986, three years prior to the enactment of FIRREA, the Court expressed its reluctance "to rest our judgment on FIRREA alone," and turned to the question whether the FDIC could make a case for creation of a rule of common law. *Id.* at 87, 89.

16. At oral argument, the FDIC's counsel analogized the proposed common-law imputation rule to the *D'Oench* doctrine, drawing from the Court the observation that FIRREA "was legislated against a background of federal common law," which included *D'Oench*. Oral Argument, *O'Melveny & Myers v. FDIC*, No. 93-489, 1994 WL 665048 *35-36 (Mar. 21, 1994).

Applying the principle that the power to *create* federal common law is "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law,' " the Court found no such conflict:

> What is fatal to respondent's position in the present case is that it has identified no significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty — but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules.

512 U.S. at 87-88 (citation omitted). The Court also rejected the FDIC's argument that, because application of California law would defeat its action, the federal interest in maintaining the insurance fund authorized the creation of a common-law rule "because there is no federal policy that the fund should always win." *Id.* at 88.

There is no mention of *D'Oench* in the *O'Melveny* decision. Nor did the Court perforce announce any clearly-stated rule of law on the continuing viability of the doctrine. In *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995), however, the D.C. Circuit concluded that *O'Melveny & Myers* leads to the conclusion that the *doctrine* has been preempted by FIRREA. *Id.* at 38. Based entirely upon the inclusion of Section 1821(d)(9)(A) in the list of "special federal rules of decision" identified by the Court in *O'Melveny*, the D.C. Circuit concluded that this Court

"necessarily decided the *D'Oench* question" because "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute — of which the *D'Oench* doctrine is one." 61 F.3d at 39.

C. *Motorcity I.*

The Eleventh Circuit addressed the continuing viability of *D'Oench*, as well as the D.C. Circuit's *Murphy* decision, in *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (*en banc*), *vacated and remanded, sub nom. Hess v. FDIC*, 519 U.S. 1087 (1997), *on remand*, 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998) (*Motorcity I*). The court commenced its analysis with a discussion of the relationship between *D'Oench* and Section 1823(e):

> As originally enacted in 1950, § 1823(e)(1) paralleled the facts of the *D'Oench* case itself: it applied only to the FDIC in its corporate capacity when it purchased bank assets from its receivership division. However, the federal policy expressed in the *D'Oench* decision "applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records." Courts therefore applied the federal common law *D'Oench* doctrine to protect certain entities not covered by the language of § 1823(e)(1) — including, for example, the FDIC as receiver, the [FSLIC], and transferees of assets (such as bridge banks) from banking regulatory agencies. Courts also applied the *D'Oench* bar to secret agreements between borrowers and a subsidiary of the failed financial institution under the regulatory agency's control. Furthermore, as originally enacted, § 1823(e)(1) generally applied only to preclude defenses raised by borrowers to avoid repaying their loans. Courts

> applied the federal common law *D'Oench* doctrine to bar the assertion of affirmative claims against the FDIC including claims sounding in tort.

83 F.3d at 1325-26 (citations omitted).

The court next addressed the question whether, as held by the D.C. Circuit, "the federal common law *D'Oench* doctrine has been preempted by statute." *Id.* at 1327. Beginning with the proposition that *D'Oench* "is a leading example of the Court's use of federal statutes to identify those 'uniquely federal interests' that require the creation of federal common law," *id.* at 1328, the court set forth the analytical framework for determining whether the doctrine had been supplanted by FIRREA:

> Because the application of federal common law is so closely tied to congressional intent, the task of determining whether a particular federal statute displaces existing federal common law requires courts to inquire carefully into the purposes of the legislation. Courts must be mindful that "the federal lawmaking power is vested in the legislative, not the judicial branch of government," and that federal common law is often merely a "necessary expedient" in instances in which "Congress has not spoken to a particular issue." Accordingly, courts should not require from Congress "the same sort of evidence of a clear and manifest purpose" to preempt as they require in considering whether a federal statute displaces state law. At the same time, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Therefore, although "Congress need not 'affirmatively proscribe' the common law doctrine at issue," its purpose to preempt existing federal common law at a minimum must be "evident."

Id. at 1329 (citations omitted).

The Eleventh Circuit rejected the D.C. Circuit's reliance on *O'Melveny & Myers*:

> We believe that *Murphy* erred in relying on *O'Melveny*. The question presented in *O'Melveny* was whether the federal courts should create a new federal common-law doctrine in an area in which Congress had not expressed any special concern, nor indicated that a special federal rule of decision should govern. In this case, the question presented *is not whether a new rule should be invented, but whether Congress intended to abrogate the previously-established federal common-law D'Oench doctrine*, which doctrine operates in an area of special federal concern as recognized by Congress, the Supreme Court, and the lower federal courts. The *O'Melveny* analysis does not apply to this question.

Id. at 1330 (emphasis added).

The court turned to *United States v. Texas*, 507 U.S. 529 (1993), to "provide[] the appropriate guidance for courts in their efforts to determine whether Congress intended that FIRREA abrogate the previously-established and longstanding federal common-law *D'Oench* doctrine." 83 F.3d at 1330. Applying the *Texas* analytical framework, the court recognized that Sections 1823(e)(1) and 1821(d)(9)(A) reflect that "Congress specifically carved out as an area of special federal concern the area involving the protection of the FDIC from secret or oral agreements." *Id.* at 1331 (footnote omitted). Accordingly, the court addressed the question "whether Congress intended §§ 1821(d)(9)(A) and 1823(e)(1) to eliminate the entire body of federal common law known as the *D'Oench* doctrine," *id.*, as follows:

> [T]he question in the instant case is whether or not it is "evident" that Congress intended to preempt the longstanding federal common law *D'Oench* doctrine. There is no indication in the statute or the legislative histories of either the 1950 or the 1989

> acts that Congress intended to preempt the federal common law. Just as it had done in 1950, Congress in FIRREA incorporated parts of the evolving common law *D'Oench* doctrine, *e.g.*, its application in both the corporate and receivership capacities, and its application to affirmative claims as well as defenses. Although the legislative history with respect to these two sections of the mammoth FIRREA is sparse, what little there is suggests that Congress intended no change in existing law.
>
> Significantly, neither FIRREA in general, nor §§ 1821(d)(9)(A) and 1823(e)(1) in particular, comprehensively address the substance of the federal common law *D'Oench* doctrine. . . . Congress did not focus on the range of secret agreements with respect to which the FDIC would be afforded protection. Rather, in this regard, the only relevant language is in § 1823(e)(1), which Congress merely carried over from the statute originally enacted in 1950. We therefore see no indication either in the language of the statue itself or in the legislative history that Congress undertook a comprehensive examination of the federal common law *D'Oench* doctrine, or made any attempt to address comprehensively that vast doctrine. "[S]uch reticence while contemplating an important and controversial change in existing law is unlikely. . . . At the very least, one would expect some hint of a purpose to work such a change, but there was none."

Id. at 1332 (citations omitted).

That the statute and the doctrine complement each other, as this Court recognized in *Langley*, also guided the Eleventh Circuit:

> The statute at issue began in 1950 as a partial codification of the *D'Oench* case. Subsequently, just as the *D'Oench* decision itself was a common law

rule fashioned to fill the interstices of federal statutes, courts continued to apply the common law *D'Oench* doctrine beyond the confines of the statutory language in order to fulfill Congress' purposes in enacting § 1823(e)(1). Thereafter, in the intervening forty years, the common law *D'Oench* doctrine and the cases under the statute evolved together, each drawing upon the other. The Supreme Court in *Langley v. FDIC*, interpreted the statute broadly in order to serve the purpose of the common law *D'Oench* case. Since the creation of § 1823(e)(1) in 1950, innumerable cases in every circuit court of appeals have held that the common law *D'Oench* doctrine and the statute continued to apply and complement each other. Thus, in 1989, when Congress addressed this special area of federal concern as a small part of the overall crisis in the banking industry, Congress was looking at forty years of harmonious coexistence of the common law doctrine and the statute. When Congress merely carried over the substance of the § 1823(e)(1) language, we believe that the most reasonable reading of the congressional intent is that Congress codified parts of the evolving *D'Oench* common law, left the state of the law unchanged, and left in place both the statute and the federal common law *D'Oench* doctrine to fill in the inevitable gaps left by the statutory language.

Id. at 1333.

The court accordingly concluded:

> [N]o language in the statute refers directly to the common law *D'Oench* doctrine. The only language in the statute even relevant to the issue . . . — the range of oral agreements with respect to which the FDIC will be protected — is found in § 1823(e)(1), and its language was merely carried over intact from prior law.
>
> * * *

> . . . Motorcity's construction would have the "anomalous effect" of undermining the purposes of FIRREA. . . . Such an interpretation would undermine the core purpose of both the *D'Oench* doctrine and its statutory cousins, *i.e.*, allowing the FDIC to make its necessary decisions and evaluations, which sometimes must be made with lightning speed, by relying on the written bank records.

83 F.3d at 1333-34. The court held that neither the 1950 nor the 1989 statutes preempted the *D'Oench* doctrine. *Id.*

D. *Atherton v. FDIC.*

The Court's decision in *Atherton v. FDIC*, 519 U.S. 213 (1997), arose from an action brought by the RTC, as receiver for a failed savings institution, against the bank's officers and directors for negligence and breaches of fiduciary duty. *Id.* at 215. Invoking 12 U.S.C. § 1821(k) (establishing "gross negligence" standard for liability of directors or officers of a federally-insured bank), the defendants obtained a dismissal of all claims, save those for gross negligence. *Id.* at 216. The Court was called upon to enunciate the appropriate legal standard for evaluating the behavior of the bank's directors and officers. *Id.* at 217.

The Court commenced its analysis "by temporarily setting the federal 'gross negligence' statute to the side, and by asking whether, were there no such statute, federal common law would provide the applicable legal standard." *Id.* at 217. The Court recognized that, in *Briggs v. Spaulding*, 141 U.S. 132 (1891), it had "articulate[d] federal common-law corporate governance standards, applicable to federally chartered banks." *Atherton*, 519 U.S. at 217. That decision, however, was quickly discarded — *not* because it was superseded or preempted by FIRREA, but because the Court determined that the federal common-law principle in that decision "did not survive this Court's later decision in *Erie R. Co. v. Tompkins*." *Id.* at 217, 226. Applying the rules that govern the question whether a *new* rule of common

law should be created by the federal courts, the Court determined that there was "no significant conflict with, or threat to, a federal interest" posed by the application of state law to determine the liability of directors or officers of a federally-insured banking institution. *Id.* at 217-26.

The Court then adverted to the question whether Section 1821(k) supplants state-law standards of care. 519 U.S. at 226. Relying on the statute's avowed purpose, the legislative history, and an express savings clause (providing that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law"), the Court held that the statute establishes only "a 'gross negligence' floor," under the following analysis:

> Congress did not ask whether one looked to federal common law or to state law to find the liability standard applicable to federally chartered banks. Nor did it try to determine the content of federal common law. One can reconcile congressional silence on the matter with a "gross negligence" statute, the language of which brings all banks (federal and state-chartered) within its scope, simply by assuming that Congress, when enacting the statute, wanted to leave other law, including the law applicable to federally chartered banks, exactly where Congress found it. That, after all, is what the statute says. . . .

Id. at 227-31.

E. *Motorcity II*.

This Court remanded *Motorcity I* for further consideration in light of *Atherton*. *Hess v. FDIC*, 519 U.S. 1087 (1997). On remand, the Eleventh Circuit reinstated its original decision after analyzing *Atherton* and concluding that the *D'Oench* doctrine remains viable and is consistent with *Atherton*. *Motorcity of Jacksonville, Ltd. v. Southeast*

Bank, N.A., 120 F.3d 1140 (11th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1093 (1998) (*Motorcity II*).[17]

The court harmonized its holding in *Motorcity I* with *Atherton*:

> *Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine. It is true that the *Atherton* facts implicated the preexisting federal common law rule announced in *Briggs*. However, rather than addressing whether § 1821(k) displaced the *Briggs* rule, the Court explicitly set § 1821(k) to the side and addressed the different

17. Approximately one month after *Atherton*, as noted in Respondent's Brief in Opposition to Petition for Writ of Certiorari at 7-8, the FDIC announced a policy decision on the application of *D'Oench* and the pertinent provisions of FIRREA. Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver for Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (Federal Deposit Insurance Corp. Feb. 10, 1997). Based upon its interpretation of *D'Oench* and the statutes, the FDIC determined that Sections 1823(e) and 1821(d)(9)(A) "bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine." *Id.* Accordingly, the FDIC announced that it would continue to assert *D'Oench*, standing alone, only "for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable" and, "[f]or claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA)." *Id.* On remand in *Motorcity*, the Eleventh Circuit noted that the FDIC had not asserted the Statement of Policy as relevant to the court's disposition of the issues, but that, "if the FDIC's position is correct, and if § 1821(d)(9)(A) applies to this case, then the FDIC would prevail without our needing to reach the preemption issue." *Motorcity II*, 120 F.3d at 1144 n.6.

issue of whether *Briggs* survived *Erie*. After concluding that *Briggs* did not survive, thus leaving no federal common law regarding the standard of care, the Court obviously never reached or addressed any issue of statutory abrogation of federal common law. Thus, in *Atherton*, as in *O'Melveny & Myers v. FDIC*, the Court's analysis focused on determining whether to create federal common law.

By contrast, the federal common law rule at issue in this case, the *D'Oench* doctrine, was first articulated by the Supreme Court in 1942, after *Erie*. The issue in this case therefore is not whether the *D'Oench* doctrine survived *Erie*, but rather whether Congress intended FIRREA to supplant the previously established and long-standing federal common law *D'Oench* doctrine. As explained in our previous *en banc* opinion, *United States v. Texas*, applies in this context and provides a presumption in favor of retaining existing federal common law unless a statutory purpose to the contrary is evident.

* * *

. . . [W]e decline to accept Motorcity's invitation to overrule *D'Oench*. With the *D'Oench* doctrine safely in place as a long-standing federal common law rule, we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States v. Texas*, and not that articulated in *Atherton* and *O'Melveny*. We continue to believe that the analysis set forth in our prior *en banc* opinion reflects the most reasonable reading of Congress's intent — *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.

Motorcity II, 120 F.3d at 1143-44 (citations and footnotes omitted); *accord, e.g., Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir.), *cert. denied*, 522 U.S. 928 (1997).[18]

The *Motorcity* decisions compelled the Eleventh Circuit's decision in Beck's favor on Murphy's appeal. *Murphy v. FDIC*, 208 F.3d 959, 963-69 (11th Cir. 2000). The court, applying *Motorcity* and other Eleventh Circuit precedents, restated its rejection of the D.C. Circuit analysis of Section 1821(d)(9), refused to allow Murphy — as a transferee from the D.C. Circuit — to import that circuit's rules of decision, and rejected Murphy's argument that the existence of a surplus in the Southeast receivership rendered *D'Oench* inapplicable. *Id.* at 963-68. Finally, the court addressed and rejected Murphy's argument that *O'Melveny & Myers* and *Atherton* support the abrogation of *D'Oench*. *Id.* at 967-69. Accordingly, the court concluded:

> [U]nder the *D'Oench, Duhme* doctrine, Murphy has failed to state a claim against the FDIC because he has not alleged a written agreement between Southeast and Orchid establishing their joint venture relationship, the *D'Oench, Duhme* doctrine remains

18. The Eighth Circuit, prior to *Motorcity I*, had accepted the D.C. Circuit's *Murphy v. FDIC* decision as a proper construction of the FIRREA enactments. *DiVall Insured Income Fund Limited Partnership v. Boatman's First National Bank of Kansas City*, 69 F.3d 1398, 1402 (8th Cir. 1995). The Third Circuit recently has also followed the D.C. Circuit's *Murphy* decision in *FDIC v. Deglau*, 207 F.3d 153, 170 (3d Cir. 2000). The First Circuit has elected not to address the question directly, *FDIC v. Houde*, 90 F.3d 600, 605 n.5 (1st Cir. 1996), but has heard *D'Oench* claims raised by an assignee of the FDIC. *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68-69 (1st Cir. 1999). The Tenth Circuit has also declined to address the issue, *FDIC v. Noel*, 177 F.3d 911, 918 n.5 (10th Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 935 (2000), and the Ninth Circuit "assume[s]" that *D'Oench* remains viable (although that court declines to apply the doctrine in the particular situation where the FDIC acts as a receiver and merely "stands in the shoes of the insolvent bank"). *Ledo Financial Corporation v. Summers*, 122 F.3d 825, 829 & n.2 (9th Cir. 1997). This Court declined to review *Motorcity II*. *Hess v. FDIC*, 523 U.S. 1093 (1998).

> good law in the Circuit, and there is no sound reason not to apply the doctrine in this case.

Id. at 969.

III. The Eleventh Circuit Correctly Analyzed The Question Whether The *D'Oench* Doctrine Survives The FIRREA Statutes.

A. The Analytical Framework.

Beginning with *Erie*, the Court has taken great pains to implement a strict regime in the field of federal common law, allowing federal common-lawmaking — in the sense of judge-created law that is independent of any constitutional or statutory imperative — "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (footnotes omitted). *Atherton* reaffirmed those fundamental limitations:

> The Court has said that "cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.' " "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for " 'Congress acts . . . against the background of the total corpus juris of the states. . . .' " Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." Indeed, such a "conflict" is normally a "precondition."

Atherton, 519 U.S. at 218 (citations omitted); *accord, e.g., O'Melveny & Myers*, 512 U.S. at 87; *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-08 (1988); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-28 (1979).

Murphy leans heavily on this body of law, insisting that the viability of the *D'Oench* doctrine must be determined as if the Eleventh Circuit created the rules of decision for this case out of whole cloth. Brief for Petitioner at 11-14. According to Murphy, application of these principles requires the conclusion that "[t]he FDIC-Receiver may not invoke the federal common law to defeat claims or defenses involving the rights of a bank in receivership." *Id.* at 13 (citing *O'Melveny & Myers*, 512 U.S. at 87).[19] Murphy is incorrect.

The proper starting point is *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981). There, the Court addressed the question whether the Federal Water Pollution Control Act Amendments of 1972, establishing "a new system of regulation" to govern the discharge of pollutants, under the auspices of the Environmental Protection Agency (EPA), supplanted federal common law so as to bar a nuisance claim arising from the discharge of pollutants into Lake Michigan. *Id.* at 307-12. The Court commenced its analysis by drawing the distinction between the *creation* and the *abrogation* of federal common law that was recognized by the Eleventh Circuit in the *Motorcity* decisions:

> Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. *Erie* recognized as much in ruling that a federal court could not

19. Murphy acknowledges that "*O'Melveny* arguably involved a request for a 'new' rule," but insists that the issue is before this Court in that same posture. Brief for Petitioner at 22-24.

generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress.

When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," the Court has found it necessary, in a "few and restricted" instances, to develop federal common law. Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. We have always recognized that the federal common law is "subject to the paramount authority of Congress." It is resorted to "[i]n absence of an applicable Act of Congress," and because the Court is compelled to consider federal questions "which cannot be answered from federal statutes alone." Federal common law is a "necessary expedient," and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

Id. at 313-14 (citations omitted).[20] When the Congress "speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the [statute] becomes meaningless." *Id.* at 315 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).[21]

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20. The Court cited Justice Jackson's concurring opinion in *D'Oench*. *Id.* at 314 (quoting *D'Oench*, 315 U.S. at 469 (Jackson, J., concurring)).

21. The Court distinguished the analysis that is appropriate to the question whether federal statutory law preempts state law, which

(Cont'd)

Finding that the amendments at issue "were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation," and that the Congressional intent had been "to establish an all-encompassing program of water pollution regulation" — indeed, "the most comprehensive legislation ever developed in its field," 451 U.S. at 317-18, — with provisions that covered every claim sought to be raised under federal common law, *id.* at 319-25, the Court held that "no federal common-law remedy was available" to press a nuisance claim. *Id.* at 325-32.

Thereafter, in *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104 (1991), the Court invoked the established rule of *Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952), to set forth the analysis of when statutory preemption can be found:

> Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident."

501 U.S. at 108 (citations omitted). The *Astoria* language greatly influenced the Court's subsequent decision in *United States v. Texas*, 507 U.S. 529 (1993), the touchstone of the Eleventh Circuit's analysis of the determinative issue.

The question before the Court in *Texas* was whether the Congress, in the Debt Collection Act of 1982, had abrogated "the United States' federal common-law right to collect prejudgment interest on debts owed to it by the States."

(Cont'd)

question requires the federal courts to afford "due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." *Id.* at 316-17.

507 U.S. at 530. The longstanding common-law principle at issue was that "parties owing debts to the Federal Government must pay prejudgment interest when the underlying claim is a contractual obligation to pay money." *Id.* at 533 (citations omitted). "Just as longstanding," the Court declared,

> is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." In such cases, Congress does not write upon a clean slate. In order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law.

Id. at 534 (citations omitted). The Court rejected Texas's argument that "this presumption favoring retention of existing law is appropriate only with respect to state common law or federal maritime law," *id.*, as follows:

> Although a different standard applies when analyzing the effect of federal legislation on state law, there is no support in our cases for the proposition that the presumption has no application to federal common law, or for a distinction between general federal common law and federal maritime law in this regard. We agree with Texas that Congress need not "affirmatively proscribe" the common-law doctrine at issue. But as we stated in *Astoria*, . . . "courts may take it as given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.' "

Id. at 534 (citations omitted).

The Debt Collection Act at issue in *Texas* empowered agency heads to charge "a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person." 31 U.S.C. § 3717(a)(1). The definition of a

"person" under the Act expressly excluded state and local governments. 31 U.S.C. § 3701(c). Accordingly, Texas asserted that the statutes established the Congress's intent "to relieve the States of their common-law obligation to pay prejudgment interest." 507 U.S. at 534-35. The Court rejected that argument:

> The only obligation from which § 3701 exempts the States is the obligation to pay prejudgment interest in accordance with the mandatory provisions of the Act. These impose a stringent minimum interest requirement upon private persons owing money to the Federal Government. The statute is silent as to the obligation of the States to pay prejudgment interest on such debts. We agree with the Solicitor General that "Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area."

Id. at 535 (footnote omitted). The Court observed that the Congress's "obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *Id.* at 535 n.4.

That the Court, in *O'Melveny & Myers*, had occasion to cite *City of Milwaukee* and *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981), for the proposition that it will not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed" because "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law," *O'Melveny & Myers*, 512 U.S. at 85, does not serve to conflate disparate analytical frameworks, as suggested by Murphy. See Brief for Petitioner at 22-24. Rather, as this Court elucidated in *Texas*, addressing Congress's choice to

include only "persons" in the Debt Collection Act, the presumption is that Congressional silence leaves the law as it was:

> Congress in the Act tightened the screws, so to speak, on the prejudgment interest obligations of private debtors to the Government, and not on the States. It may be inferred from this fact that the former were the root of the Government's debt collection problems which inspired the Act. But it does not at all follow that because Congress did not tighten the screws on the States, it therefore intended that the screws be entirely removed. The more logical conclusion is that it left the screws in place, untightened.

507 U.S. at 537-38. Indeed, as previously noted, this Court endorsed that approach in *Atherton*, suggesting there that Congressional silence required the court to assume "that Congress, when enacting the statute, wanted to leave other law . . . *exactly where Congress found it*." 519 U.S. at 231 (emphasis added).[22]

22. Murphy's passing attempt to transform the inquiry into one that is appropriate when *state* law is purportedly displaced by a federal statute, Brief for Petitioner at 24-26, is entirely misdirected. Unlike the second question addressed in *Atherton*, *i.e.*, whether Section 1821(k) "[s]upplants any state-law standard of care," 519 U.S. at 226, the question before the Court in this case is whether *any* provision in FIRREA supplants an entire pre-existing *federal common-law doctrine*. What Murphy appears to be saying is that *Texas* is inapposite to the question whether a federal statute displaces or supplants federal common law when the federal common-law principle itself can be said to have displaced state law. No precedent is cited for this proposition, Brief for Petitioner at 24-26, and the creation of any rule so stating would seem to be inconsistent with the fundamental notion that the implementation of federal common law is primarily justified by the existence of "a *significant conflict* between some federal policy or interest and the use of state law." *O'Melveny & Myers*, 512 U.S. at 87 (emphasis added). Murphy's argument would thus simply write *Texas* out of existence.

B. Application of the *United States v. Texas* Standard.

1. Congressional intent.

In *Motorcity I*, the Eleventh Circuit applied the *Texas* principles as follows:

> We conclude that it is even clearer in this case than in *Texas* that Congress did not intend to preempt the prior federal common law *D'Oench* doctrine. Texas held that the statute did not "speak directly" to the issue, notwithstanding the fact that the statute addressed the area of the government's debt collection and addressed prejudgment interest in particular, and notwithstanding the fact that Congress expressly excluded states from the operation of the statute. In the instant case, no language in the statute refers directly to the common law *D'Oench* doctrine. The only language in the statute even relevant to the issue presented by *Motorcity* — the range of oral agreements with respect to which the FDIC will be protected — is found in § 1823(e)(1), and its language was merely carried over intact from prior law.

Motorcity I, 83 F.3d at 1333.[23]

In challenging this analysis, Murphy argues that the "detailed legislative treatment of the effectiveness of unwritten agreements suggests that Congress extended protection to such parties and such claims as it thought proper, and declined to go further." Brief for Petitioner at 19. To be sure, the enactment of "a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *City of Milwaukee*, 451 U.S. at 319. Here, regardless whether FIRREA fairly can be characterized, in an overall sense, as

23. The court adhered to this ruling on remand from this Court to reconsider its decision in light of *Atherton*. *Motorcity II*, 120 F.3d at 1143.

"comprehensive," no intent to supplant the common-law *D'Oench* doctrine can be deduced.

This is so because the keystone provision — Section 1823(e) — *was not substantively amended* by FIRREA in 1989. Section 1821(d)(9)(A) does not purport to define, much less to restrict, the range of secret agreements as to which that provision may be invoked when an affirmative claim is brought against the FDIC. Rather, "[t]he substance of § 1823(e) — *i.e.*, the range of secret agreements prohibited by the statutes — *was left untouched*" by the Congress in 1989. *Motorcity I*, 83 F.3d at 1327 (footnote omitted; emphasis added). The only reasonable conclusion is that the Congress elected to expand the *contexts* in which the FDIC could invoke Section 1823(e), leaving alone the *substantive* scope of the *D'Oench* doctrine.

As briefly noted earlier, see n.17, the FDIC certainly has so construed the statutes:

> In the FDIC's view, Congress intended that section 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, . . . these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), *regardless of whether a specific asset is involved*, to the same extent that such claims would be barred by the *D'Oench* doctrine.

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver for Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (Federal Deposit Insurance Corp. Feb. 10, 1997) (emphasis added).

The FDIC has been charged with acting pursuant to the *D'Oench* doctrine since 1942, and with administering the

pertinent statutes since 1950.[24] Its interpretation of the interaction between the statutes and the common-law doctrine certainly has the "power to persuade" and should be taken into serious account. *Christensen v. Harris County*, __ U.S. __, 120 S. Ct. 1655, 1663 (2000).

2. Applying the *Texas* presumption to the *D'Oench* doctrine.

Murphy's final line of defense to the application of the *Texas* presumption is that the *D'Oench* doctrine, as of the enactment of FIRREA in 1989, was "a mongrel descendant" of the *D'Oench* decision, Brief for Petitioner at 3, and was either: (i) "invalid federal common law," (ii) preempted by the 1950 adoption of Section 1823(e), or (iii) lacking in "the common-law credentials of the original decision." *Id.* at 16 & n.6, 21, 23 n.10, 26-29. Reduced to its essence, Murphy's argument is that this Court should overrule *all* federal decisions applying the *D'Oench* doctrine to any set of circumstances beyond those of *D'Oench* itself, *i.e.*, secret agreements raised in defense of a claim brought by the FDIC in its corporate capacity with regard to a specific asset acquired by the FDIC. Murphy's manifest motivation is to cut loose the common-law moorings of virtually all post-*D'Oench* decisions and thereby evade application of the *Texas* presumptions.

The asserted "invalidity" of the *D'Oench* doctrine rests on the notion that the "wayward *extensions*" of the original *D'Oench* decision by the courts of appeals, particularly the application of the doctrine to the FDIC, in its receivership capacity, as a defense against affirmative claims, serves "nothing

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24. As the Eleventh Circuit remarked in *Motorcity II*, if the FDIC's position is correct and it is taken to its logical extent, the entire question whether FIRREA preempted the *D'Oench* doctrine is essentially moot. *Motorcity II*, 120 F.3d at 1144 n.6. The Court, however, need not go nearly that far; the FDIC's analysis of Sections 1823(e) and 1821(d)(9)(A) serves well as a guidepost for resolving the more straightforward question whether the doctrine survives in the first instance.

remotely resembling a significant federal interest." Brief for Petitioner at 15-16 (original emphasis). But the Congress clearly disagrees.

As previously discussed, Section 1823(e) was amended in 1989 (and presently exists as 12 U.S.C. § 1823(e)(1)) to provide that "[n]o agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase *or as receiver of any insured depository institution*, shall be valid" unless the writing and recording requirements of the statute are satisfied. 12 U.S.C. § 1823(e)(1) (emphasis added). Similarly, Section 1821(d)(9)(A) imports the requirements of Section 1823(e) and provides that "any agreement which does not meet the requirements" of that section "shall not form the basis of, or substantially comprise, a claim *against the receiver or the Corporation*." 12 U.S.C. § 1821(d)(9)(A) (emphasis added). By providing for the FDIC's entitlement to use the *D'Oench* doctrine as a defense, both in its corporate and receivership capacities, the Congress plainly was codifying the pre-existing *D'Oench* common law. *Motorcity I*, 83 F.3d at 1326-27.

Moreover, no court of appeals has ever accepted the distinction that Murphy asks this Court to draw between the FDIC in its corporate capacity and its receivership capacity. *See RTC v. Dunmar Corp.*, 43 F.3d at 596 n.5 (collecting cases).[25] There is good reason for this unexceptional application of the doctrine. First, in *D'Oench* itself, this Court alluded to the potential application of the doctrine to the FDIC as receiver, *D'Oench*, 315 U.S. at 458 ("the rule which prevents an accommodation maker of a note from setting up the defense of

25. Those courts that have accepted the primary premise of Murphy's argument, *i.e.*, that FIRREA has supplanted *D'Oench*, either wholly or in part, also have foreclosed application of the common-law extension of *D'Oench* to the FDIC as receiver. *See FDIC v. Noel*, 177 F.3d 911, 918 n.5 (10th Cir. 1999) (collecting cases), *cert. denied*, __ U.S. __, 120 S. Ct. 935 (2000).

no consideration against a bank *or its receiver or creditors* is not delimited to those instances where he has committed a statutory offense"; an "accommodation maker is not allowed that defense *as against the receiver of the bank* and its creditors . . . where his act contravenes a general policy to protect the institution of banking from such secret agreements") (emphasis added), thus leading the first court squarely to address the question to reject the contention that *D'Oench* cannot apply to the FDIC as receiver:

> Appellants also seek to distinguish *D'Oench* on the grounds that the FDIC was there proceeding as a creditor of the bank, whereas it is here proceeding as a receiver of the bank. The express language of the Court in *D'Oench*, which refers to receivers as well as creditors, precludes this distinction.

FDIC v. First National Finance Co., 587 F.2d at 1012 (citing *D'Oench*); *accord, Expansion of D'Oench, supra* at 772 ("[a]lthough *D'Oench* technically involved the FDIC acting only as a federal corporation, based upon the Court's reliance on the state common law estoppel cases (which invariably involved state receivers), *D'Oench* would logically seem to apply to the FDIC in its receivership capacity as well").

Second, the exception urged by Murphy would swallow the rule. If the FDIC, in its receivership capacity, cannot use *D'Oench* to defend against affirmative claims based upon secret agreements, the FDIC's right to invoke the doctrine in bringing claims against a borrower would become wholly illusory. A borrower could recoup the monies sought by the FDIC simply by bringing an unbarred counterclaim based upon a secret agreement. *Hall v. FDIC*, 920 F.2d at 340 ("the effect of such an approach would be to reduce actions Congress has allowed the FDIC to approach to nullities since defendants could counterclaim and recover what they lost").[26]

26. This practical recognition of the need to extend *D'Oench* to the FDIC as receiver — and this Court's declaration of policy in *Langley* — convinced the Eleventh Circuit to depart from its holding in *Gunter*

(Cont'd)

Murphy offers no cogent rationale for departing from this rule.

Murphy's second contention is that the *D'Oench* doctrine was actually overruled in *1950*, when the Congress first adopted Section 1823(e). Brief for Petitioner at 16 n.6, 23 n.10. As discussed in Point I.B., *supra*, no court has ever held in accordance with Murphy's view, and all authority is — and always has been — to the contrary. *See Motorcity II*, 120 F.3d at 1144 n.6; *Motorcity I*, 83 F.3d at 1332.[27] The reenactment of Section 1823(e) in 1989, without substantive change, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 217(4), 103 Stat. 183, 256, can be seen only as Congressional acceptance of the prior interpretations of the 1950 enactment, *e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and the 1950 statute therefore

(Cont'd)
v. Hutcheson, 674 F.2d at 872-73, that the FDIC may invoke *D'Oench* as a bar to fraud defenses only in its corporate capacity. *FSLIC v. Two Rivers Associates*, 880 F.2d at 1276-77 ("the reasoning behind *D'Oench, Duhme* requires that it be applied to protect the FDIC and the FSLIC regardless whether the regulatory body is acting in its capacity as a receiver or as a corporate insurer").

27. Murphy's *ipse dixit* argument seeks support in this Court's *Langley* decision. Brief for Petitioner at 20 (*Langley* "suggests that the federal common-law *D'Oench* doctrine did not separately survive even its 1950 codification"). But this Court was not called upon to address the question whether *D'Oench* remained valid after 1950 and did not purport to do so. The passage upon which Murphy relies speaks to the question whether the FDIC's alleged knowledge of a secret agreement can suspend operation of the *D'Oench* doctrine, and does not even touch upon the interaction of the doctrine and the statute. 484 U.S. at 95. Murphy necessarily ignores the Court's express acknowledgment of the continued vitality of *D'Oench* as the wellspring for defining the scope of unenforceable secret agreements under Section 1823(e). 484 U.S. at 92-3.

cannot be construed, as Murphy would have it, as the "demise" of *D'Oench*. Brief for Petitioner at 16 n.6.[28]

In his penultimate position, Murphy argues that the post-1978 applications of *D'Oench* "lack the common-law credentials of the original decision," that this Court (with the exception of *Langley*) has not spoken to *D'Oench* and has not approved the decisions of the courts of appeals, and that the common law is thus insufficiently "well established" to invoke the *Texas* presumption. Brief for Petitioner at 26-29. As Murphy apparently sees it, this Court's *decision* in *D'Oench* may be sufficiently "long in the tooth" for invocation of the *Texas* presumption, but *none* of the *D'Oench* progeny from 1978 through 1989 is sufficiently "aged" or "familiar." Brief for Petitioner at 26. This argument reflects a fundamental misconception as to the very nature of common law.

"It has been said so often as to become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Lutwak v. United States*, 344 U.S. 604, 615 (1953) (citation omitted). The *D'Oench* doctrine has developed in accordance with this axiom and, as Beck has set forth, each of the permutations derives from the policy underlying that decision — and particularly as reinforced and refined by this Court's *Langley* decision. Murphy cites no authority for a "partial" invocation of the *Texas* presumption, whereby one or two pieces of an established common-law doctrine are preserved while others are picked

28. The practical implications of a declaration, some 50 years later, that a statutory enactment displaced *D'Oench*, should not be lightly overlooked. Following the enactment of Section 1823(e) in 1950, "the common law *D'Oench* doctrine and the cases under the statute evolved together, each drawing upon the other," *Motorcity I*, 83 F.3d at 1333, as is perhaps most clearly shown by this Court's *Langley* decision. A holding that the statute caused the "demise" of *D'Oench* in 1950 would require the federal courts to engage in the impossible task of parsing each of the precedents to determine which aspects were solely based upon Section 1823(e), so as to eschew reliance on any common-law rulings.

off as insufficiently "aged" or "familiar."[29] Murphy cannot avoid the controlling federal common law.

C. The Applicability of *D'Oench* to Successors.

Throughout his brief, Murphy attempts to recast this litigation as a dispute between two *private parties*, ultimately arguing that the case "affects only the shareholders of the Bank and petitioner Murphy, and does not even remotely implicate significant federal interests." Brief for Petitioner at 15. Thus, the survival of the *D'Oench* doctrine notwithstanding, Murphy would have the Court disavow application of the doctrine to the FDIC's successors.

Even *D'Oench*'s critics have failed to question extending the doctrine's protections to the FDIC's successors. *Expansion of D'Oench, supra* at 773 (including successors within *D'Oench*'s protection "is logical given the fact that the underlying justification for the *D'Oench* rule is illegality (*i.e.*, public policy) and therefore third parties who are not *in pari delicto* should be allowed to avail themselves of the rule"). Application of the common-law doctrine to successors in interests has been a completely non-controversial development in *D'Oench* jurisprudence. *E.g., First Union National Bank of Florida v. Hall*, 123 F.3d 1374, 1379 & n.8 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1135 (1998); *FSLIC v. Griffin*, 935 F.2d 691, 696 (5th Cir. 1991); *Castleglen v. RTC*, 984 F.2d 1571, 1576-77 (10th Cir. 1993).[30]

29. This Court, as the ultimate maker of federal common law, is fully empowered to revisit its common-law doctrines and to make such revisions as are deemed appropriate. Beck believes that there is nothing in the modern *D'Oench* jurisprudence that would warrant reconsideration, and, indeed, Murphy does not appear to seek such relief. But, in any event, that would not be the same thing as the doctrinally-unsupported selective invocation of the *Texas* presumption that is sought by Murphy.

30. The Fourth Circuit has suggested that assignees are within the scope of Section 1823(e), *Federal Financial Co. v. Hall*, 108 F.3d 46, 49-50 (4th Cir.), *cert. denied*, 522 U.S. 858 (1997), and the Eighth Circuit (after having adopted the D.C. Circuit's *Murphy* rationale) (Cont'd)

But the Court should have no occasion to reach that question here. Murphy brought his action *against the FDIC* and it was the *FDIC's motion to dismiss* that was heard and addressed by the district court. In what was nothing more than an accident of timing, Beck, as successor agent, was substituted as the party defendant for the FDIC in the Southern District of Florida while the motion to dismiss was pending.[31] Had this Court been presented with the case, either from the D.C. Circuit or the Eleventh Circuit, prior to Beck's substitution, there would have been *no* issue as to successors under *D'Oench* — and there should be none now. The question before the Court remains whether *D'Oench*, as a common-law doctrine applicable to the FDIC to defend against affirmative claims based upon unwritten agreements, survives FIRREA. Because, as has been set forth in this brief, the answer should be that *D'Oench* does indeed survive as a "safety net" to ensure that the beneficial purposes of the FIRREA statutes are fully realized, the Eleventh Circuit's decision should be affirmed.

(Cont'd)
declined to reach the question whether successors are entitled to protection under Section 1823(e) and tolerated the district court's ruling that the statute applies to successors. *Kessler v. National Enterprises, Inc.*, 165 F.3d 596, 599 n.2 (8th Cir. 1999). The First Circuit, which had elected not to address the question whether *D'Oench* survives as a common-law doctrine independent of FIRREA — *e.g., FDIC v. Houde*, 90 F.3d at 605 n.5 — treats Section 1823(e) and *D'Oench* as a single doctrine and has heard *D'Oench* claims raised by an assignee of the FDIC. *Beal Bank, SSB v. Pittorino*, 177 F.3d at 68-69.

31. *See* 12 U.S.C. § 1297 (successor agent assumes responsibilities of FDIC as receiver).

CONCLUSION

Based upon the foregoing, Beck respectfully requests the Court to affirm the Eleventh Circuit's decision in all respects.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

The federal common-law rule invoked by respondent shares little with the original *D'Oench* decision beyond its name: not only are the rights of the United States not implicated, but the basic equitable principles underlying *D'Oench* are either absent from or actively subverted by the rule invoked here. Federal statutes have thoroughly addressed any federal interests driving the original *D'Oench* case, and the application of state law in this case poses no significant conflict with any federal interest sufficient to support extra-statutory federal rules of decision.

SUMMARY OF ARGUMENT

The validity *vel non* of respondent's asserted common-law rule is a prior and independent requirement that respondent cannot meet. The various asserted interests in speedy evaluation of failed banks, avoiding circumvention of asset recoveries, and deterring unrecorded agreements may be served by *statutory* defenses enacted by Congress and not questioned here, but those interests do not support extension of a common-law rule beyond the statute to this case, and in many respects such extension would actually undermine those interests. The valid scope of any common-law rule entirely depends on a conflict with federal interests, and with no such conflict, there is no valid rule.

The passage of FIRREA, and the 1950 Act before it, both eliminated the need for federal common law and spoke directly to the questions supposedly addressed by federal common law, thus creating an exclusive negative inference regardless of whether the common law at issue is old or new. Furthermore, there is no question that the particular rule sought by respondent did not pre-exist FIRREA. The attempt to shift to a presumption preserving an abstract and mutable principle not yet applied as a concrete rule is not supported by the cases and would contradict this Court's restrictive view of

conflict-based federal common law. Indeed, that variety of common law is so questionable to begin with that it should not benefit from any preserving presumption. Finally, even if a presumption in favor of existing common law were applied, FIRREA and the 1950 Act spoke directly to the relevant questions and hence overcome that presumption.

ARGUMENT

I. No Valid Federal Common Law Is Applicable to this Case.

A. *O'Melveny* and *Atherton* Both Apply.

Though disputing the applicability of the field-preemption analysis of *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), respondent does not dispute the holding of both *O'Melveny* and *Atherton* v. *FDIC*, 519 U.S. 213 (1997), that the validity of federal common law must be established independently of any issue of statutory displacement. As in *Atherton*, that requirement applies with full force regardless of whether the lower courts have been erroneously applying the relevant common-law rule for decades.

Nor does respondent dispute the limitations established in *O'Melveny* and *Atherton* regarding the availability and validity of federal common-law rules for the benefit of the FDIC-Receiver: the FDIC-Receiver "is not the United States"; it is required to establish a rare "'significant conflict'" between state law and federal policy; and "[n]ot only the permissibility but also *the scope* of judicial displacement of state rules turns upon such a conflict." *O'Melveny*, 512 U.S. at 85, 87-88 (emphasis added) (citation omitted).

As for *O'Melveny*'s field-preemption analysis, respondent only claims that it does not apply to supposedly pre-existing and well-established federal common law, defending the Eleventh Circuit's reliance on *United States* v. *Texas*, 507 U.S. 529 (1993). Importantly, aside from that attempt at avoiding *O'Melveny*, respondent does not even attempt to

suggest that his extraordinarily expansive version of the *D'Oench* doctrine would survive *O'Melveny*'s displacement analysis. As discussed below, the *Texas* approach does not apply to this case, and hence *O'Melveny* mandates reversal.

B. The *D'Oench* Doctrine Is Independently Invalid as Applied to this Case.

Even when the FDIC-Receiver was a party to this case, it asserted only private interests, not those of the United States. *Atherton*, 519 U.S. at 225; *O'Melveny*, 512 U.S. at 85. And prior to the district court's *sua sponte* ruling on the unbriefed *D'Oench* issue, the FDIC-Receiver had left the scene entirely, and the remaining assets of the bank had been returned to the agent *for the shareholders*. Whereas the FDIC-Receiver once merely stood in the Bank's shoes, those shoes were returned to their original owners and are now occupied by respondent.[1]

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[1] Respondent deems this mere happenstance, and the Solicitor General claims the issue was not raised below. Resp. Br. 14 n.11, 49; U.S. Br. 7, 27. Neither is correct. The substitution of respondent was the expected and required result of the receivership completing its task with a surplus. Respondent is a successor not through purchase or the like, but solely as an agent of the shareholders appointed to take receipt of the excess from the receivership. 12 U.S.C. § 197. That is no happenstance. Petitioner objected to application of *D'Oench* for the benefit of such a successor and argued that barring his claim ran contrary to the purposes underlying the original *D'Oench* decision. Br. of Appellant (CA11), at 20; Reply Br. (CA11), at 8, 13-15. Similarly, petitioner argued before the Eleventh Circuit that both *O'Melveny* and *Atherton* barred application of the *D'Oench* doctrine. Br. of Appellant (CA11), at 20. Those cases addressed the basic validity of federal common law for the benefit of the FDIC-Receiver, not merely issues of statutory displacement, and their invocation below is more than adequate to preserve an argument that respondent's rule is unsupported by any conflict with federal interests or policies. Finally, discussions of whether the details of respondent's rule comport with the *D'Oench* decision or had even evolved prior to 1989 are appropriate responses to the Eleventh Circuit's reliance on *Texas*, and in any event are squarely encompassed within the Question Presented and the discussion in the Petition. And they constitute prior issues properly addressed regardless of whether they were raised below. See *Lebron* v. *National R.R. Pas-*

Despite the private interests served by both respondent and his predecessor the FDIC-Receiver, respondent and the Solicitor General nonetheless assert several putative federal interests in support of an extended *D'Oench* doctrine: (1) allowing reliance on the speedy evaluation of a failed bank when making the decision to liquidate or to use a purchase and assumption ("P&A") transaction, Resp. Br. 4, 12-13; U.S. Br. 2; (2) avoiding circumvention of the primary rule applicable to asset collection by barring affirmative claims, Resp. Br. 4, 12-13, 45-46; (3) deterring use of unrecorded agreements and promoting proper lending practice, U.S. Br. 2, 9; (4) protecting creditors, depositors, and the FDIC from absorbing losses, U.S. Br. 2; and (5) promoting prompt and cost-effective resolution of litigation, *id.* at 2, 9. But such supposed interests are fully served by statute and cannot support the extra-statutory *scope* of the federal common-law rule respondent seeks.[2]

Reliance on Rapid Evaluations of Failed Banks. The rapid evaluation/reliance interest is only implicated if and when the FDIC-Corporate chooses a P&A transaction instead of a liquidation. In such a case, the FDIC-Corporate may indeed rely on its favorable § 1823(e)-enhanced assessment of the bank's condition when deciding to make payments from the insurance fund in exchange for bank assets. Cf. Resp. Br. 12-13 (acknowledging connection between policy interest and P&A transactions, citing *Gunter* v. *Hutchinson*, 674 F.2d 862 (CA11), *cert. denied*, 459 U.S. 826 (1982)). The economics of the P&A decision could well be undermined if unrecorded

senger Corp., 513 U.S. 374, 379 (1995); *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 n.6 (1980).

[2] The FDIC's assertions regarding the need for expansive application of *D'Oench* have also been the subject of criticism generally. *E.g.*, *Hearing of S. 648 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 93-106 (1995) (prepared testimony of Prof. Peter P. Swire).

agreements subsequently blocked collection on the assets taken by the FDIC-Corporate.

But where even the enhanced valuation of a failed bank is still so unfavorable as to trigger liquidation instead of a P&A transaction, there is no conceivable reliance on the value-*inflating* qualities of the *D'Oench* doctrine or even the statute. If the bank later proves worse off than originally thought, that only *corroborates* the choice to liquidate and undermines nothing. This alleged interest simply does not apply in the liquidation context.

That the *statutory* defense nonetheless extends to the FDIC-Receiver does not rebut the lack of a federal interest. Respondent offers no explanation of the policy behind such statutory extension, Resp. Br. 44, none is particularly evident, and Congress is free to act for reasons trivial or mistaken. The mere existence of a limited statutory defense for FDIC-Receiver, inapplicable to this case, does not demonstrate the "high federal interest" required for federal common law. *O'Melveny*, 512 U.S. at 86; see *Atherton*, 519 U.S. at 218.[3]

Respondent's observation that *D'Oench* itself cited state-law equitable defenses available to state receivers and banks, Resp. Br. 44, does not show that it intended to create *federal* law governing receivers and private parties as well as the FDIC-Corporate. Rather, *D'Oench* took that state-law rule as the touchstone for its own rule applicable to the rights of the United States, leaving state law to address the rights of other parties, including receivers. See *D'Oench, Duhme & Co.*,

[3] Respondent's claim that "no court of appeals has ever accepted the distinction" between FDIC-Corporate and FDIC-Receiver, Resp. Br. 44, is disproved by his own citations to *Ledo Financial Corp.* v. *Summers*, 122 F.3d 825, 829 & n.2 (CA9 1997), and *Gunter* v. *Hutchinson*, 674 F.2d 862, 873 n.15 (CA11), *cert. denied*, 459 U.S. 826 (1982), making precisely such a distinction, Resp. Br. 33 n.18, 45-46 n.26. Any contrary and ill-considered views in other lower-court cases hardly undermine a material distinction that this Court itself has twice relied upon in similar circumstances. See *O'Melveny*, 512 U.S. at 85; *Atherton*, 519 U.S. at 225.

Inc. v. *FDIC*, 315 U.S. 447, 457-59 (1942). And that is how the case has been understood over time – as having developed federal common law because the rights of the United States were involved. See *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 519 (1988) (citing *D'Oench* as an example of federal common law governing the "obligations to and rights of the United States under its contracts"). The claim that *D'Oench* meant to federalize all of the state law it cited, even as to situations *not* involving the rights of the United States, has no support in the case and could not be reconciled with subsequent cases limiting federal common law.

No Circumvention Through Affirmative Claims. Respondent incorrectly asserts that failure to extend the *D'Oench* doctrine to affirmative claims would "swallow the rule" as applied to asset collections by allowing a borrower to "recoup the monies sought by the FDIC simply by bringing an unbarred counterclaim based upon a secret agreement." Resp. Br. 45. Whatever the merit of this concern in the FDIC-Corporate context, it makes absolutely no sense in the receivership context because a successful claim against a receivership would not automatically offset even a related collection effort.[4] Rather, recognizing a valid claim in this context only generates the right to stand in line along with other recognized claimants and await potential payment according to the applicable payment priorities. Receivership expenses, depositor liabilities, and any reimbursement to the FDIC-Corporate all take priority over general liability claims such as in this case. 12 U.S.C. §§ 1821(d)(11)(A), 1821(g). With direct statutory protection against defenses to asset collection itself, the prioritization of recovery for affirmative claims eliminates any purported conflict with federal interests. Indeed, the only consequence of disallowing petitioner's claim

[4] The circumvention rationale is even more preposterous as applied to "no-asset" claims such as in this case because there is no attempted asset recovery to be circumvented.

entirely will be to enhance the recovery of the bank's shareholders at the expense of a *victim* of the bank's secret agreement, a result entirely at odds with the equitable and policy concerns underlying the original *D'Oench* decision.

No Federal Policy Requiring Maximum Deterrence of Unrecorded Agreements. While the original *D'Oench* decision may have somewhat discouraged unrecorded agreements, that does not establish a significant federal interest in *maximizing* the deterrence of such agreements by continually expanding the doctrine beyond the scope of what Congress has seen fit to enact after repeated consideration. As this Court recognized in *Miree* v. *DeKalb County*, 433 U.S. 25, 32 (1977), the fact that a rule "might be thought to advance federal * * * policy by inducing compliance with" federal regulations is insufficient to justify adoption of such rule as federal common law where only the rights of private parties, not the rights of the United States, are at issue. See also *O'Melveny*, 512 U.S. at 89 (rejecting claim that state rule would "disserve the federal program").

Furthermore, the alleged deterrence interest is not served in cases such as this, where petitioner was not a customer of the bank and had no involvement in or responsibility for making the agreement. See Pet. App. C6 (noting absurdity of applying recording requirements to bar claims by third parties such as Murphy). To bar Murphy's claim against the Bank would not deter such secret agreements, it would *reward* them by permitting them to form the basis of a fraud for which the victim cannot recover. The claimed deterrence interest thus does not support extending the "scope" of federal common law to the type of claims at issue in this case.

Protection of Depositors, Creditors, and the FDIC-Receiver. As noted above, neither depositors nor the FDIC-Receiver face any risk from application of state law to allow the type of affirmative claims in this case. Those claims have lower priority than claims by depositors of the FDIC-Receiver itself. And as for protecting creditors, Murphy is also an in-

nocent potential judgment creditor, and there is absolutely no federal interest in balancing the private rights of one creditor against another in a manner different from state law. Adjusting such wholly private rights is the province of state law. See *O'Melveny*, 512 U.S. at 84.

Litigation Ease. The assertion that the FDIC-Receiver's litigation success and ease is the type of federal interest sufficient to underpin federal common law is both unsupported and incredible. As this Court noted in *O'Melveny*, there is no federal interest in seeing that the FDIC-Receiver wins more frequently, much less in helping it avoid the ordinary consequences of litigation. 512 U.S. at 88.[5]

What is most telling about the various interests alleged to justify the common-law rule invoked in this case is how little they have to do with the federal interest actually articulated in *D'Oench* itself: a "federal policy to protect [FDIC-Corporate] and the public funds which it administers against misrepre-

[5] In response to the contradiction between the assertion of federal interests in the *D'Oench* doctrine and FDIC-Receiver's policy to eschew all reliance on such common law in pre-FIRREA cases, Pet. Br. 20, the Solicitor General responds with the non-sequitur that FDIC's policy statement has no bearing on Congress' intent when enacting FIRREA. U.S. Br. 22 n.10. But the FDIC-Receiver's abandonment of the common-law *D'Oench* doctrine, including, presumably, the inchoate and evolving *D'Oench* "principle" in favor of the statutory defenses, forcefully demonstrates the absence of a conflict with a significant federal interest beyond the confines of the statute. Indeed, the government repeatedly touted the irrelevance of the common-law doctrine in Briefs in Opposition to this Court when trying to avoid review. See Pet. Br. 20 (citing FDIC's prior oppositions). If the *D'Oench* doctrine remains as valuable as the Solicitor General now conveniently claims, the FDIC-Receiver would be confessing its own malfeasance in abandoning such an important defense and in misleading the Court as to its continuing importance. Petitioner prefers to think the FDIC-receiver was half right in the first place: the common-law *D'Oench* doctrine serves no significant federal interests, particularly after FIRREA, and its continuing importance as far as this Court is concerned arises from the failure of private successors to abandon the defense as the FDIC-Receiver claims to have done.

sentations as to the securities or other assets in the portfolios of the banks which [FDIC-Corporate] insures or to which it makes loans." 315 U.S. at 457. That policy has no application to the FDIC-Receiver, to successor agents for the shareholders, or to no-asset affirmative claims. Accordingly, there is no legitimate basis for applying the expanded federal common-law rule sought by respondent. Respondent's ultimate notion that *D'Oench* is needed "as a 'safety net' to ensure that the beneficial purposes of the FIRREA statutes are fully realized," Resp. Br. 49, is no different than the FDIC's earlier claim that state law would "'disserve the federal program,'" which this Court found to be a "facile approach to federal-common-law-making." *O'Melveny*, 512 U.S. at 89.

C. FIRREA Preempts the Field for Federal Common Law Defenses in Connection with Receiverships.

Aside from his purported creation/abrogation dichotomy as a means of avoiding *O'Melveny*'s field-preemption and *inclusio unius* analysis, respondent essentially concedes that if the relevant common law did not exist prior to FIRREA, its creation post-FIRREA is forbidden. And even assuming that respondent's common-law defense here pre-existed FIRREA, that would not eliminate the *inclusio unius* inference; it would merely pit it against a competing presumption of preservation. Petitioner's initial discussion of *O'Melveny* and *Langley* v. *FDIC*, 484 U.S. 86 (1987), demonstrates that the exclusivity inference is extremely strong, and that the preservationist presumption is weak given the nature of the common-law rule asserted in this case. Pet. Br. 18-20 & n.7. That *inclusio unius* inference is sufficient to overcome even the *Texas* presumption. See *infra*, Part II(D).

II. THERE IS NO BASIS FOR AVOIDING THE RULE OF *O'MELVENY* AND *ATHERTON*.

Respondent's attempt to avoid *O'Melveny* and *Atherton* turns primarily on the claim that those decisions deal only with creation of *new* rules whereas *United States* v. *Texas*

provides a distinct and exclusive analytical framework for old common-law rules. But respondent fails to justify application of the *Texas* approach to the very different circumstances of this case.

A. Invalid Federal Common Law Is Not Presumed Retained, Regardless of Its Age.

Respondent does not dispute that if the federal common-law rule at issue is invalid on its own merits it is not preserved by subsequent congressional action. The *Texas* principle assumes neutrality, not approval, and will not save prior common law the defect of which is subsequently revealed. That was the case in *Atherton*, where erroneous lower court application of the *Briggs* rule was not validated by FIRREA. Likewise, if respondent's proposed rule fails the primary validity analyses from *O'Melveny* and *Atherton*, there is nothing in *Texas* that would save the rule and the displacement/preservation issue becomes irrelevant.

B. *O'Melveny* and *Atherton* Both Apply to Pre-Existing Federal Common Law.

Citing the occasional reference to the "creation" of federal rules of decision, respondent claims that the analytical tools in *O'Melveny* and *Atherton* do not apply to pre-existing federal common law. Resp. Br. 22, 23, 29-31. But neither case suggested that a different analysis would apply when scrutinizing previously created federal common law, and both in fact cited a variety of such cases as part of their reasoning. That *Atherton* was not limiting its discussion to novel acts of creation can be seen by its consideration of "whether relevant federal common-law standards could have survived *Erie*." 519 U.S. at 218. The issue was not whether to create a new rule, but whether an old rule remained viable after the rejection of an underlying predicate. Given that the lower courts and federal agencies had continued to apply the rule for decades after *Erie* and prior to FIRREA, that rule was far better established from Congress' perspective at the time of FIRREA's enactment than were the then-non-existent mutations of the *D'Oench* doctrine upon which respondent relies here.

And in *O'Melveny*, while the Court may have viewed the specific requested rule as new, the FDIC-Receiver in that case made the same claim it makes here: that the particular rule was merely an application of a more general federal common-law "principle." Brief for the FDIC, *O'Melveny & Myers* v. *FDIC*, No. 93-489, at 41 (Feb. 18, 1994). In fact, it claimed that the applicable federal principle derived from the *D'Oench* doctrine itself and that "Congress did not intend to overrule that principle when it enacted FIRREA." *Id.* While the particular rule sought in *O'Melveny* thus may have been new, the government's reliance on an allegedly pre-existing "principle" raised exactly the same analytical issue that respondent raises here.

Respondent cites to *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), for a supposed "distinction between the *creation* and the *abrogation* of federal common law." Resp. Br. at 35 (emphasis in original). But the *Milwaukee* passage quoted by respondent speaks of the use of federal common law under a variety of circumstances, and does not suggest that the initial decision to create common law is significantly different from the subsequent analysis of whether such law remains viable. See 451 U.S. at 313-14 (noting that federal common law is created only as a "necessary expedient" in the "absence of an applicable Act of Congress," and that once "Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears"). Rather than distinguishing creation and retention, *Milwaukee* equates them and holds that where the "need" that would justify initial creation of common law ceases to exist because a federal statute is available, the justification for continuation of an earlier rule would likewise disappear. The proper test, therefore, is that if a rule could not be justified as new common law, it cannot be retained as an old common law.

Furthermore, *Milwaukee*'s caution against supplementation that makes a statute "meaningless," 451 U.S. at 315, applies to both new and old common law and is particularly relevant to respondent's sweeping vision of the *D'Oench* doctrine. If the *D'Oench* doctrine represents an encompassing principle rather than specific rules, it would render the provisions of FIRREA entirely meaningless. There is nothing covered by the statute that would not be covered by the overstated *D'Oench* doctrine, and there is no defense eliminated by the statute that would not be covered by the common law. But there is no reasonable explanation for why, as respondent asserts, Congress would have *partially* codified the *D'Oench* doctrine in this fashion.[6]

C. The *Texas* Approach Does Not Apply to the Common-Law Rules Asserted in this Case.

Regardless of whether the *Texas* approach is in fact distinct and more forgiving than the *O'Melveny* analysis, it does not properly apply in this case because the relevant common-law rules were not well-established when FIRREA was passed, extension of *D'Oench* to this case would not involve core federal common law, and any such presumption would clash with the greater presumption in favor of retaining state rules of decision. Any favorable *Texas* presumption should be limited to the far more compelling circumstances present in that case, where the elimination of a core federal common-law rule governing the rights of the United States itself would have led to absurd results.[7]

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[6] Respondent relies upon *Astoria Federal Savings & Loan Association* v. *Solimino*, 501 U.S. 104, 108 (1991), for a presumption of common-law retention. Resp. Br. 37. But *Astoria* notes that the presumption in favor of a more policy-based common law rule does not demand a "clear statement" in order to be overcome, and can be defeated by implication from other aspects of a statute. 501 U.S. at 108-10.

[7] *Texas* also is easily distinguishable because the statute in that case addressed the federal government's right to secure interest from private parties rather than states, which were not included within the definition of "person." Nothing in FIRREA's comprehensive scheme of regulation, by contrast, indicates that Congress left a particular application of the *D'Oench* doctrine to be addressed through common law.

Absence of Pre-FIRREA Common Law Applicable to this Case. Respondent cannot deny that the federal common law *rule* as invoked in this case was not established in 1989 when FIRREA was passed. Compare Pet. Br. 26-28 (pre-FIRREA cases mixed on applicability to FDIC-Receiver and non-existent on affirmative claims or successors) with Resp. Br. 13-14 (citing mostly *post*-FIRREA cases on FDIC-Receiver and successors, never denying that the few pre-FIRREA cases were mixed).[8] Respondent's own citations demonstrate that a major aspect of its asserted rule was affirmatively rejected by some courts prior to FIRREA. Resp. Br. 45-46 n.26 (citing pre-FIRREA case limiting *D'Oench* to FDIC-Corporate and noting its rejection only in a post-FIRREA decision). And, of course, the true test of the existence of a federal common-law rule – recognition by this Court – has never occurred for the specific rule invoked by respondent. The vastly different and narrower *D'Oench* decision simply does not suffice.

Unable to defend the specifics of his rule, respondent instead claims that it is the "policy underlying" the *D'Oench* decision that was preserved by the *Texas* presumption and thus remains available to "'adapt[] itself to varying conditions.'" Resp. Br. 47 (quoting *Lutwak* v. *United States*, 344 U.S. 604, 615 (1953)). *Lutwak*, however, involved an express

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[8] The federal *amici*'s citation to several pre-FIRREA cases finding *D'Oench* applicable to FDIC-Receiver conveniently ignores the *other* cases from the same period finding precisely the opposite. U.S. Br. 12-13 (selective reference to cases). Furthermore, many of the cases cited therein merely applied the doctrine to the FDIC-Receiver without discussing whether such application was proper. Courts that actually considered the issue pre-FIRREA reached differing results. Pet. Br. 26-27. Conflicting lower court decisions provide nothing on which to hang the *Texas* presumption.

delegation of authority to the courts to interpret and develop common-law rules of evidence. 344 U.S. at 614. That is far different from the highly restricted variety of federal common law at issue here, which is at best available if, and only to the extent that, a conflict with federal policy exists. Such common law is neither mutable nor flexible, but rather highly constrained by the conflicts which justify its existence.

The notion that the *Texas* presumption applies not to specific rules but rather to sweeping policies has never been accepted by this Court and is fully inconsistent with any number of cases, including *O'Melveny*. Indeed, in *O'Melveny* the FDIC-Receiver unsuccessfully made the virtually identical argument that the longstanding "principle" of *D'Oench* formed the basis for the particular rule it was seeking. FDIC Br. in *O'Melveny*, at 41; see also *id.* at 31, 34.[9]

In petitioner's view, the proper level of generality when analyzing supposedly pre-existing common law is at the level of a particular and well-established rule. Any presumption saving open-ended "principles" that could animate new common-law *rules* would in effect eliminate the *O'Melveny* analysis even if that case were viewed as limited to new rules.

Respondent's claim that this Court has recognized *D'Oench* as a "valid declaration of common-law principles," Resp. Br. 10, ignores the nature of the "principle" so recognized. See *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305 (1947) (citing *D'Oench* as example involving the rights of the United States); *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 101 (1945) (merely citing *D'Oench* as an example of a claim based on federal law, without elaboration). This Court in *Langley* did not acknowledge any continuing common-law

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[9] The FDIC-Receiver's prior position creates a dilemma: either *O'Melveny* dealt with a pre-existing "principle" and hence is on all fours with respondent's view of this case, or the proper focus is not on the principle, but on the particular *rule*, in which event this case involves the post-FIRREA "creation" of a rule just as much as did *O'Melveny*.

validity to *D'Oench* at all, but rather used it as a tool of statutory construction and effectively rejected the notion of extra-statutory federal rules. See 484 U.S. at 95. And in *Boyle* v. *United Technologies*, a case cited by *amici*, U.S. Br. 13, 22 n.9, *D'Oench* was given as an example of federal common law governing the "obligations to and rights of the United States under its contracts." 487 U.S. at 519. Insofar as this Court recognized a "principle" from *D'Oench*, it is a principle that does not apply to this case.[10]

Suspect Category of Federal Common Law. Regardless of whether the *Texas* approach applies to preservation of core federal common law, it should not apply here given that this case involves the much disfavored category of conflict-based judicial policymaking. Any such judicial lawmaking raises constitutional doubts distinct from other types of federal common lawmaking, uniquely burdens state law, and undermines the much stronger presumption favoring preservation of those rules. Pet. Br. 18 n.7, 24-26. And because the particular rule has never previously been recognized by *this* Court, there is even greater reason to withhold any presumption favoring continuance of the rule. Indeed, respondent cites not a single case where the presumption was applied to a rule not specifically recognized by this Court.

Respondent claims that denying the *Texas* presumption to federal common law that displaces *state* common law would

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[10] Quoting a redacted line from the oral argument in *O'Melveny*, respondent claims that a member of this Court observed that "FIRREA 'was legislated against a background of federal common law,' which included *D'Oench*." Resp. Br. 22 n.16. But the unredacted comment at oral argument demonstrates the precise opposite sentiment: "the legislation at issue in that case [*D'Oench*] was undoubtedly enacted on the assumption that Federal courts applied Federal law, period. You wouldn't have to dance around *Erie* and *Claxton* and all of that stuff. But we're in a different age now. You can't --- * * * -- and I don't think Congress when it passes a statute like this assumes that there's some brooding Federal law that governs all of this stuff." *O'Melveny* Oral Arg.Tr., 1994 U.S. Trans. Lexis 155, *34 (March 21, 1994).

be inconsistent with the "significant conflict" basis of certain federal common law rules and would therefore "write *Texas* out of existence." Resp. Br. 40 n.22 (addressing Pet. Br. 24-26). But *Texas* did not involve a "conflict"-based federal common-law rule, but rather involved the rights of the United States. Denying the presumption to conflict-based federal common law would not eliminate the *Texas* decision, but would properly confine it to only those legitimate instances of federal common law involving direct federal rights rather than federal intercession into areas more properly the province of the states. Far from being unsupported by authority from this Court, that proposed limitation best harmonizes *Texas* with this Court's admonitions regarding the limits on judicial policymaking outside of the traditional federal areas. See *Milwaukee*, 451 U.S. at 317 n.9 ("the very concerns about displacing state law which counsel against finding pre-emption of state law in the absence of clear intent actually suggest a willingness to find congressional displacement of federal common law").

D. FIRREA Overcomes Even the *Texas* Presumption.

Even assuming application of the *Texas* presumption to the supposed "principles" of *D'Oench*, FIRREA (and the 1950 statute) overcomes that presumption. FIRREA's extension of the statutory rule to additional parties and claims necessarily would have limited, not enhanced, the far more sweeping *D'Oench* principle postulated by respondent. If nothing else, § 1823(e)'s "asset" requirement places a considerable restriction on the scope of the defense.[11] That requirement, and indeed, the statutory defense in its entirety, would be utterly meaningless if the sweeping common-law principle claimed by respondent continued to exist.

[11] Respondent cites with uncertain favor to the FDIC's 1997 Statement of Policy for the proposition that § 1821(d)(9)(A) does not incorporate the asset requirement of § 1823(e). Resp. Br. 42; see also U.S. Br. 26 n.11 (same). This argument was litigated and lost in the D.C. Circuit, not renewed before the Eleventh Circuit, and is not part of the Question Presented. Respondent does not even ask this Court to so construe the statute. Resp. Br. 43 n.24; U.S. Br. 26 n.11 (statutory issue not presented).

Respondent questions the comprehensiveness and specificity of FIRREA in an attempt to reduce the *inclusio unius* inference. Resp. Br. 41-42. But this Court has previously rejected such arguments about FIRREA and held that the statute comprehensively and exclusively covered the field of special federal defenses for the FDIC-Receiver. *O'Melveny*, 512 U.S. at 86-87. And as regards the *D'Oench*-related provisions themselves, FIRREA directly spoke to the types of claims covered and the entities that could invoke the defense, notably including a limited class of assignees and transferees – bridge banks. Pet. Br. 18-19 (discussing statute). FIRREA is more than comprehensive enough to trigger a strong exclusionary inference. Such an inference is sufficient to displace pre-existing common law. See *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Astoria*, 501 U.S. at 110.[12]

Respondent's suggestion, Resp. Br. 35-37, that *Milwaukee* requires a greater level of specificity is mistaken. As the Court noted in *Milwaukee*, the "question is whether the field has been occupied, not whether it has been occupied in a particular manner." 451 U.S. at 324.

Interestingly, the limitations on pollution at issue in *Milwaukee* were only minimum limitations, and the scheme allowed for more stringent state regulation of pollution. But the fact that the scheme did not address pollution control beyond the minimum requirements was not sufficient to leave room

[12] Respondent's citation to *Atherton* for the proposition that when enacting FIRREA Congress "'wanted to leave other law * * * exactly where Congress found it,'" Resp. Br. 40 (quoting 519 U.S. at 231), conveniently redacts the sentence immediately following, which, referring to a specific savings clause, continuues: "That, after all, is what the statute says." 519 U.S. at 231. But there is no such savings clause applicable to the common-law *D'Oench* doctrine.

for *federal* common law above those minimum restrictions. 451 U.S. at 319-20 & n.14. The statute's failure expressly to preclude more restrictive federal limits, did not detract from its comprehensive and preemptive effect on prior federal common law. FIRREA is no different.[13]

Even apart from FIRREA, the 1950 Act spoke directly to, and hence displaced, the then-fledgling *D'Oench* doctrine. Indeed, respondent's *amici* describe the 1950 Act as having "codified the application of the *D'Oench* rule on facts parallel to the *D'Oench* case," U.S. Br. 17, and respondent himself recognizes that the 1950 Act "had the effect of making the common-law principles of *D'Oench* 'both more encompassing and more precise.' * * * The statute is narrower because it is applicable only to specific assets of an insolvent institution, but it is broader because it applies regardless of the customer's blameworthiness." Resp. Br. 11 (citation omitted); see also *id.* at 12 n.9 (quoting FDIC testimony that the 1950 legislation "'may be characterized as a codification of the law pertaining to the [FDIC]'") (citation omitted).

These descriptions amply demonstrate that the 1950 Act spoke directly to the question formerly addressed by the common-law *D'Oench* decision and in so doing fully displaced such common law even under the *Texas* standard.[14] Respondent's only answer to this is that no court has previously so held. But the failure of lower courts to consider or

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[13] The federal *amici* imply that Congress is required affirmatively to "express disapproval" before pre-existing common law will be displaced. U.S. Br. 22; see also *id.* at 4. But that has never been the test and is not required. Indeed, it would be an odd statute indeed that contained such an expression of an intent to abrogate the common law, and the Solicitor General cites to none despite the many cases in which this Court has found statutory displacement of federal common law.

[14] Respondent's recognition that after 1950 the common-law *D'Oench* "doctrine lay dormant until the late 1970s," Resp. Br. 4, seems to corroborate that for decades courts and the FDIC understood the statute to have displaced the common law.

correctly resolve an issue is hardly a reason for this Court to acquiesce in or compound that error. No court for over 60 years had held that the *Briggs* rule under consideration in *Atherton* had been overruled by *Erie*. Extended error is nonetheless error, and should be corrected.

The notion that the reenactment and expansion of § 1823(e) by FIRREA demonstrated "acceptance of the prior interpretations of the 1950 enactment," Resp. Br. 46, even if correct, would actually support petitioner given that the 1950 *statute* was interpreted narrowly as not reaching the FDIC-Receiver or assigns or affirmative claims and as being limited to "asset" cases – hence the supposed need for federal common law. Congressional acceptance of statutory interpretation does not even remotely signal acceptance of federal common law not purporting to interpret the statute.

Finally, the Solicitor General's fleeting reference to the legislative history of FIRREA is also unavailing. Nothing in that history indicates Congress intended to preserve *D'Oench* as a common-law principle, much less *D'Oench*'s frequently mutating, modern offspring. To the contrary, the legislative history does not even acknowledge the common-law doctrine, referring only to the government's *statutory* defense, a fact that supports petitioner's view that *D'Oench* was abrogated as early as 1950. *See* H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. I, at 128 (1989) ("In general the FIRRE Act provides, as the FDI Act presently provides, that no agreement can form the basis of a claim against the Corporation or the conservator or receiver unless it is in writing and properly approved and maintained in the records of the institution."); *id.* at 214 (similar). The single sentence on which Solicitor General relies, U.S. Br. 13 – that FIRREA's amendment to 12 U.S.C. § 1823 "clarifies the current provision invalidating certain secret agreements against the interests of the FDIC," H.R. Rep. No. 54, at 334 – again refers only to the statutory defense, and even if it referred to the common law doctrine would equally support petitioner's view that FIRREA represents the full ex-

tent to which Congress intended to codify "the *D'Oench* principle," U.S. Br. 2 n.1.

To the extent Congress' failure to adopt a particular statute can ever have persuasive effect, the Solicitor General's reliance on Congress' failure to enact *The D'Oench Duhme Reform Act*, S. 648, 104th Cong., 1st Sess. (1995), is particularly misplaced. It appears that any momentum for the bill was killed by the FDIC's response to it: FDIC's issuance of the policy statement providing that it would no longer assert the common law *D'Oench* doctrine as to post-FIRREA transactions. *See Hearing on S. 648 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 49 (1995) ("*S. 648 Hearing*") (prepared statement of Sharon Powers Silverstein, Asst. Gen. Couns., FDIC) (describing "the recent implementation by the FDIC of guidelines," which were issued after original introduction of bill). Moreover, the government's assertion that "the common law *D'Oench* doctrine * * * * was the impetus for the bill," U.S. Br. 15, is simply not supported by the bill's history and the Solicitor General offers no citation or explanation for that claim. Indeed, the bill would have cut back on the *statutory* defense, *see S. 648 Hearing* at 117-20, so Congress' failure to enact it hardly indicates an intent to preserve *D'Oench* as a common law doctrine.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eleventh Circuit and remand for further proceedings.

Respectfully submitted,

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AND THE FEDERAL DEPOSIT INSURANCE CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether Congress has abrogated the longstanding federal common law doctrine established by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its progeny and, if not, whether the court of appeals erred in concluding that the applicability of that doctrine should not depend upon whether a bank receivership generates a surplus.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL DEPOSIT INSURANCE CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENT

The question presented in this case is whether Congress has abrogated the federal common law doctrine established by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its progeny. For more than half a century, the *D'Oench* doctrine has protected the Federal Deposit Insurance Corporation (FDIC) against secret agreements that may mislead bank examiners or creditors as to the financial condition of federally insured banks. The doctrine has been partially codified and enhanced by Congress. See 12 U.S.C. 1821(d)(9)(A), 1823(e). And the doctrine has been applied in literally thousands of cases, often in tandem with its statutory counterparts, to estop the assertion of claims or defenses against the FDIC, in both its corporate and re-

ceiver capacities, based on secret banking arrangements.[1] The FDIC was the initial defendant in this case, and asserted that petitioner's claims were barred under both the common law *D'Oench* doctrine and Section 1823(e).

The *D'Oench* doctrine (including its statutory protections) serves several important federal interests. First, the doctrine permits federal regulators to rely on bank records in evaluating the financial soundness of federally insured institutions and in safeguarding deposit insurance funds. Reliance on such records is critical, for example, when the FDIC is deciding whether to provide financing for the purchase of the assets of a failed bank and assumption of its liabilities by another bank, 12 U.S.C. 1823(c)(2) and (4)(A), and in conducting the receivership of a failed bank, 12 U.S.C. 1821(d) (1994 & Supp. IV 1998). Second, the doctrine promotes proper lending practices and protects against improper or collusive dealings, particularly on the eve of bank failures. Third, the doctrine protects innocent creditors and depositors of failed banks, including the FDIC, from absorbing losses that would result from recognizing secret banking arrangements, and promotes the prompt and cost-effective resolution of litigation based on unrecorded agreements allegedly made by failed banks.

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[1] Between 1989 and 1995 alone, the FDIC invoked the *D'Oench* principle in more than 5000 cases. See *Hearing on S. 648 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104 Cong., 1st. Sess. 2 (1995). In 1997, the FDIC issued a policy statement that in cases involving unrecorded agreements made after 1989, the FDIC would ground the assertion of the *D'Oench* principle in its statutory protections. 62 Fed. Reg. 5984. That policy, however, is based on the understanding that Sections 1821(d)(9)(A) and 1823(e) "should be interpreted in a manner consistent with the policy concerns underlying the [common law] *D'Oench* doctrine," and that they "bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine." *Ibid.*

STATEMENT

1. In August 1989, petitioner invested about $500,000 in the Orchid Island Associates Limited Partnership (Orchid), which sought to develop a golf and beach club in Florida. To finance the development, Orchid obtained about $50 million in loans from Southeast Bank, N.A. (Southeast). Pet. App. A2, B2. The loan documents provided that "[Southeast] is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower." *Id.* at F4 (quoting identical language in first three agreements); see *ibid.* ("In the future, at no time shall Lender be construed as having acted as a joint venturer in or a partner with the Debtor Parties in connection with the Project.") (quoting fourth agreement). Orchid defaulted on those loans; Southeast foreclosed on Orchid's mortgages; and, in September 1991, six months after the last loan to Orchid, Southeast became insolvent and was placed into receivership under the FDIC. *Id.* at A2.

2. a. In August 1992, petitioner filed suit against the FDIC, in its capacity as receiver for Southeast, in the District Court for the District of Columbia, seeking to recover his lost investment. The complaint alleged that as part of its lending transactions, Southeast had secretly become a joint venturer with Orchid, and that as receiver for Southeast, the FDIC was liable for breach of contract, breach of fiduciary duty, accounting deficiencies, fraud, negligent misrepresentation, and securities violations by Southeast. The FDIC moved to dismiss on the ground that petitioner's claims are barred under the common law *D'Oench* doctrine and the related statutory protection afforded by 12 U.S.C. 1823(e), because they are predicated on the existence of a secret joint-venture agreement between Southeast and Orchid. The FDIC further argued that the loan documents, quoted above, that were in the bank's records expressly foreclosed the recognition of any joint-venture relationship

between Southeast and Orchid on the basis of the bank's loans to Orchid. Pet. App. A3, B3.

The district court treated the FDIC's motion to dismiss as a motion for summary judgment and granted the motion, holding that petitioner's claims are barred under both the common law *D'Oench* doctrine and Section 1823(e). Pet. App. B1-B11.

b. The District of Columbia Circuit reversed. Pet. App. C1-C14. The court first noted that petitioner conceded that all of his claims (save one) are premised on the existence of an unwritten joint-venture agreement between the bank and Orchid. *Id.* at C5. The court nevertheless held that Section 1823(e) does not bar those claims because they do not relate to a specific existing asset of the bank, and that the common law *D'Oench* doctrine does not bar the claims because that doctrine was abrogated by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. Pet. App. C2. The court recognized that in the wake of FIRREA, "many courts, including we, have either explicitly stated or implicitly assumed that the federal common law [*D'Oench* doctrine] remains alive and well along side its statutory cousin." *Id.* at C12. But the court concluded that this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), "appears to leave no room for a federal common law *D'Oench* doctrine." Pet. App. C10.

On remand, the district court transferred the action pursuant to 28 U.S.C. 1404(a) to the Southern District of Florida, noting that the underlying events took place in Florida. Pet. App. D1.

3. a. In May 1998, the District Court for the Southern District of Florida granted the FDIC's motion to substitute respondent as defendant. Pet. App. E1. Respondent stepped into the shoes of the FDIC as a successor agent pursuant to 12 U.S.C. 197, and maintained the FDIC's position that petitioner's claims are barred by the *D'Oench* principle.

In July 1998, the district court granted a pending motion to dismiss, which had been filed by the FDIC and transferred along with the case from the District of Columbia, and held that petitioner's claims are barred under the *D'Oench* doctrine. Pet. App. F5-F6. In doing so, the court observed that "the Eleventh Circuit still adheres to the *D'Oench* doctrine" and has specifically rejected the argument that FIRREA abrogated that longstanding doctrine. *Id.* at F6.

b. The Eleventh Circuit affirmed. Pet. App. A1-A18. The court first concluded that the District of Columbia Circuit's ruling concerning *D'Oench* was not binding upon it as law of the case. *Id.* at A11-A12. Next, the court reaffirmed the Eleventh Circuit's position that the *D'Oench* doctrine has not been abrogated by Congress. *Id.* at A14-A18. The court explained that the presumption is that Congress has not abrogated "a long-standing federal common law rule" unless it "'speak[s] directly' to the question addressed by the common law." *Id.* at A17 & n.7 (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)). Here, the Eleventh Circuit concluded, "Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine." *Id.* at A17 (internal quotation marks omitted). And, in the court's view, neither *O'Melveny* nor *Atherton* v. *FDIC*, 519 U.S. 213 (1997), compelled a different conclusion, because those cases involved creation of new federal common law rules. Pet. App. A14-A15.

The court of appeals further held that the *D'Oench* doctrine bars petitioner's claims in this case. Pet. App. A13-A14. The only ground that petitioner pressed for avoiding the common law doctrine (assuming it has not been abrogated) was that the Southeast receivership ultimately generated a surplus. *Id.* at A13. The Eleventh Circuit explained, however, that "[p]ermitting the [*D'Oench*] doctrine to be overridden if a receivership generates a surplus in the future

undermines the doctrine's purpose of enabling the FDIC to make informed and accurate evaluations of a failed bank's assets and liabilities at the outset of the receivership in order to determine the best way to manage the bank's losses." *Id.* at A14.

SUMMARY OF ARGUMENT

I. In *United States* v. *Texas*, 507 U.S. 529, 534 (1993), this Court reaffirmed that statutes should be "read with a presumption favoring the retention of long-established and familiar [common law] principles, except when a statutory purpose to the contrary is evident." Application of that settled canon of statutory construction in this case leads to the conclusion that Congress has not abrogated the long-standing common law *D'Oench* doctrine.

The *D'Oench* case articulated a basic rule of estoppel preventing borrowers from relying on secret banking agreements to defeat interests held by the FDIC. In 1950, Congress codified that principle in certain respects and enhanced it by adding stringent recording and approval requirements. See 12 U.S.C. 1823(e) (1952). In 1982, Congress reenacted Section 1823(e) unchanged. In 1989, as part of FIRREA, Congress clarified that Section 1823(e) applies in certain additional circumstances, including to claims brought against the FDIC as receiver. See 12 U.S.C. 1821(d)(9)(A), 1823(e), as amended. Meanwhile, in the nearly 60 years since *D'Oench* was decided, federal and state courts have applied the common law *D'Oench* principle—often in tandem with its statutory counterparts—to a variety of situations that do not fit the precise facts of *D'Oench*, but to which the rationale and policy concerns of the *D'Oench* doctrine attach and thus preclude reliance on secret banking agreements.

Congress is presumed to be aware of the widespread application of the common law *D'Oench* doctrine over the past half century. While it had ample opportunity to do so when it enacted, reenacted, and amended pertinent statutory provisions, Congress has never expressed disapproval of that doctrine or its application to situations outside the statutory protections. The 1950 Act and FIRREA embraced and supplemented the common law doctrine in certain respects; but, as this Court has recognized, "Congress' obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *Texas*, 507 U.S. at 535 n.4. Moreover, the evident purpose of the 1950 Act and especially FIRREA—which was designed to *strengthen* the government's hand in regulating and liquidating failed banks—strongly supports retention, not abrogation, of the common law *D'Oench* doctrine.

This Court's decisions in *Atherton* v. *FDIC*, 519 U.S. 213 (1997), and *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), do not spell the end of *D'Oench* either. Those cases held that FIRREA foreclosed the creation of *new* federal common law rules. This case deals with the quite different question whether Congress has done away with an existing and deeply entrenched common law doctrine. That question is governed by the "presumption favoring retention of existing law." *Texas*, 507 U.S. at 534.

II. The only ground that petitioner pressed in the court of appeals in arguing that the common law *D'Oench* rule does not bar his claims (assuming the doctrine has not been abrogated) is the fact that the receivership in this case ended in a surplus. The Eleventh Circuit correctly held that that quite unusual happenstance should not defeat application of the *D'Oench* principle. There is no need for this Court to address the alternative grounds that petitioner now advances for avoiding the *D'Oench* doctrine, because those issues were not addressed below and have not been fully briefed by the parties here. In any event, the application of *D'Oench* to the FDIC as receiver and then to respondent as the FDIC's successor is consistent with the important federal interests underlying the *D'Oench* doctrine.

ARGUMENT

I. CONGRESS HAS NOT ABROGATED THE LONG-STANDING FEDERAL COMMON LAW DOCTRINE ESTABLISHED BY *D'OENCH* AND ITS PROGENY

In a number of recent decisions, this Court has addressed the proper role of federal common law in our federal system. See *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 311 (1981). Under those decisions, the areas in which federal common law exists are relatively few, and they generally implicate important federal interests or the rights and responsibilities of the United States. See *Boyle* v. *United Techs., Inc.*, 487 U.S. 500, 504 (1988). In *O'Melveny*, this Court held that there was no federal interest sufficient to warrant "judicial creation" of a new federal rule of decision respecting the tort liability of professionals who provide services to federally insured banks. 512 U.S. at 89. For similar reasons, the Court in *Atherton* declined to "create[]" a new federal common law rule governing the standard of care for the directors and officers of federally insured banks. 519 U.S. at 225-226. This case, by contrast, deals with federal common law that already has been recognized by this Court and been applied by the lower courts in a multitude of cases for more than five decades.

In *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 460 (1942), the Court held that the policies underlying the federal banking laws warranted creating a common law rule protecting the FDIC and the public funds it administers against "secret agreement[s]," "scheme[s]," or "arrangement[s]" between federally insured banks and borrowers that may have the effect of misleading bank examiners or creditors as to the financial condition of such banks. Justice Jackson concurred in that result and wrote separately to

emphasize that it was "appropriate" to fashion a federal common law rule in this instance. *Id.* at 472. As he explained, the FDIC "was created and financed in part by the United States to bolster the entire banking and credit structure," and "[t]he purposes sought to be accomplished by it can be accomplished only if it may rely on the integrity of banking statements and banking assets." *Ibid.* (footnote omitted). The basic rule of estoppel enunciated in *D'Oench* is one of the most important and longstanding protections available to the FDIC and the funds it administers, the rule creates a powerful incentive for those doing business with banks to record their financial arrangements, and the rule promotes prompt and cost-effective resolution of litigation involving certain claims against banks in receivership. See p. 2, *supra*.

Congress is free to displace federal common law. But, as this Court reaffirmed in *United States* v. *Texas*, 507 U.S. 529 (1993), "'[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *Id.* at 534 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)); accord *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("courts may take it as given that Congress has legislated with an expectation that [established common law] will apply except when a statutory purpose to the contrary is evident") (internal quotation marks and citations omitted). That canon accords with "the well-settled presumption that Congress understands the state of existing law when it legislates," *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988); accord *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), and the rule that "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change," *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989).

The question presented in this case is whether Congress has abrogated the well-established federal common law doctrine embodied by *D'Oench* and its progeny.

A. The Common Law *D'Oench* Doctrine Is Longstanding And Woven Into The Fabric Of Federal Banking Law

The *D'Oench* doctrine is deeply ingrained in federal banking law and policy. The doctrine is hardly the "mongrel" or "mut[ant]" creature conceived by petitioner (Br. 3, 22). It remains grounded in the same basic considerations articulated by this Court nearly 60 years ago in *D'Oench*; but like the prototypical common law doctrine, *D'Oench* has evolved over time. Cf. *Lutwak* v. *United States*, 344 U.S. 604, 615 (1953) ("It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.").

1. a. In *D'Oench* itself, a borrower executed a note to a federally insured bank, but made a secret agreement with the bank that the note would never be called. The FDIC acquired the note and brought suit in its corporate capacity to enforce the note; the borrower defended based on its unrecorded agreement with the bank that the note would not have to be paid. This Court concluded that the Federal Reserve Act expressed "a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans." 315 U.S. at 457. And that federal policy, the Court held, required that the borrower be estopped from relying on its secret agreement respecting the note. *Id.* at 460-461.[2]

[2] As the Court pointed out, the result in *D'Oench* squared with background principles reflected in numerous state court cases under which "an accommodation maker [was] not allowed that defense as against the receiver of the bank and its creditors * * * where his act contravene[d] a general policy to protect the institution of banking from such secret agreements." 315 U.S. at 458.

b. In 1950, Congress enacted the Federal Deposit Insurance Act, ch. 967, § 2, 64 Stat. 873 (codified at 12 U.S.C. 1823(e) (1952)). The 1950 Act embraced the ruling in the *D'Oench* case and added to it specific approval and recording requirements. Thus, the Act provided that no "agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it" from a failed bank "shall be valid" against the FDIC in its corporate capacity, unless the agreement (i) is written, (ii) was executed contemporaneously with the acquisition of the asset by the bank, (iii) was approved by the board of directors or loan committee of the bank, and (iv) has been maintained as an official record of the bank. 12 U.S.C. 1823(e) (1952).[3]

[3] The 1950 Act was enacted in place of a bill that would have *curtailed* the *D'Oench* principle by subjecting the FDIC to any defense that a debtor could have raised against the bank, except in the case of actual fraud. H.R. 5811, 81st Cong., 1st Sess. (1949). Representative Walter drafted H.R. 5811 based on the experience of a constituent, who had lost a case against the FDIC on the ground that he was estopped—under *D'Oench*—from asserting an oral agreement with a bank to avoid payment on a note, even though he claimed that he had not lent himself to any deceptive scheme or arrangement with the bank. *FDIC* v. *Alker*, 151 F.2d 907, 908-909 (3d Cir. 1945), cert. denied, 327 U.S. 799 (1946). The FDIC and others opposed H.R. 5811 on the ground that it "would encourage secret agreements between a bank and its debtors * * * to the detriment not only of [the FDIC], but also of general creditors and uninsured depositors." *Hearings on H.R. 5811 Before the House Comm. on the Judiciary*, 81st Cong., 1st & 2d Sess. 60 (1949 & 1950) [*Hearings on H.R. 5811*] (N. Blake, Associate General Counsel, FDIC); see *id.* at 209 (explaining need for "protect[ion] against any arrangements, understandings, or agreements which are not disclosed in the records of the bank and, therefore, would not be reflected in these reports") (J. Cecil, FDIC). H.R. 5811 died in committee. Shortly thereafter, with almost no additional discussion, Congress enacted Section 1823(e).

2. a. After the enactment of Section 1823(e) in 1950, courts applied the *D'Oench* doctrine and Section 1823(e) in tandem, and permitted the FDIC to assert *D'Oench* to estop claims or defenses based on secret banking arrangements that fell outside the precise facts of *D'Oench* but within the heartland of the policies articulated in *D'Oench* and reflected in Section 1823(e). Thus, for example, courts applied the *D'Oench* principle to situations in which the FDIC was acting as receiver, even though Section 1823(e) as enacted in 1950 applied only to the FDIC in its corporate capacity. See, *e.g.*, *FDIC* v. *First Nat'l Fin. Co.*, 587 F.2d 1009, 1012 (9th Cir. 1978); *FDIC* v. *General Inv., Inc.*, 522 F. Supp. 1061, 1070 (E.D. Wis. 1981); *Dominguez* v. *FDIC*, 90 F.R.D. 595, 598 (D.P.R. 1981); *British Columbia Inv. Co.* v. *FDIC*, 420 F. Supp. 1217, 1226 (S.D. Cal. 1976); *FDIC* v. *Vineyard*, 346 F. Supp. 489, 493 (N.D. Tex. 1972); *FDIC* v. *Oehlert*, 252 N.W.2d 728, 732 (Iowa 1977); see also *FSLIC* v. *Kearney Trust Co.*, 151 F.2d 720, 725 (8th Cir. 1945) (allowing Federal Savings and Loan Insurance Corporation (FSLIC) to invoke *D'Oench* as assignee of claims possessed by failed thrift). In addition, courts held that the *D'Oench* principle protects the "FDIC from all side agreements, including those between the obligor and a third party." *FDIC* v. *Hoover-Morris Enter.*, 642 F.2d 785, 788 & nn.4-5 (5th Cir. 1981) (citing additional cases).

b. In 1982, Congress reenacted Section 1823(e). Pub. L. No. 97-320, § 113(m), 96 Stat. 1474. Thereafter, courts continued to adapt the common law *D'Oench* doctrine to situations that were not explicitly covered by Section 1823(e). See, *e.g.*, *FDIC* v. *McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (applying *D'Oench* to bar defense raised against FDIC as receiver); *FDIC* v. *Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985) (same); *Beighley* v. *FDIC*, 868 F.2d 776, 784 (5th Cir. 1989) (same); *FSLIC* v. *Two Rivers Assoc., Inc.*, 880 F.2d 1267, 1276-1277 (11th Cir. 1989) (applying *D'Oench* to bar defense and counterclaims asserted against FSLIC);

Mainland Sav. Ass'n v. *Riverfront Assocs., Ltd.*, 872 F.2d 955, 956 (10th Cir.) (applying *D'Oench* to bar claim asserted against FSLIC), cert. denied, 493 U.S. 890 (1989); *Firstsouth, F.A.* v. *Aqua Constr. Inc.*, 858 F.2d 441, 442-443 (8th Cir. 1988) (applying *D'Oench* to bar defense against FSLIC); *FSLIC* v. *Lafayette Inv. Props., Inc.*, 855 F.2d 196, 198 (5th Cir. 1988) (per curiam) (same); *Andrew D. Taylor Trust* v. *Security Trust Fed. Sav. & Loan Ass'n*, 844 F.2d 337, 342 (6th Cir. 1988) (same); *FSLIC* v. *Maio*, 736 F. Supp. 1039, 1040 (N.D. Cal. 1989) (applying *D'Oench* to bar counterclaim against FSLIC); see also *FSLIC* v. *Sandor*, 684 F. Supp. 403, 406 n.8 (D.V.I. 1988) ("*D'Oench* still stands as a principle of federal common law."); *Beighley* v. *FDIC*, 676 F. Supp. 130, 132 (N.D. Tex. 1987) (FDIC may assert *D'Oench* as defense to claims against it), aff'd, 868 F.2d 776 (5th Cir. 1989).

In 1987, this Court recognized the continuing vitality of the policies underlying *D'Oench* in *Langley* v. *FDIC*, 484 U.S. 86, 91, 93, 94-95 (1987), which involved a dispute over the scope of the term "agreement" in Section 1823(e). A year later, this Court recognized *D'Oench* as an example of federal common law in an area "involving 'uniquely federal interests.'" *Boyle*, 487 U.S. at 504.

3. a. In 1989, Congress enacted FIRREA. That Act made express that Section 1823(e) covers defenses raised against the FDIC as receiver, the newly created Resolution Trust Corporation (in its corporate and receiver capacities), and bridge banks. See 12 U.S.C. 1823(e), as amended. FIRREA also added a provision stating that "any agreement which does not meet the requirements set forth in section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the [FDIC as] receiver or the [FDIC in its corporate capacity]." 12 U.S.C. 1821(d)(9)(A). The legislative history of FIRREA states that the purpose of those amendments was to "clarif[y] the current provision invalidating certain secret agreements against interests of the FDIC," including by making "clear"

that the provision applies to the FDIC when it is acting as receiver and that it bars affirmative claims that are filed *against* the FDIC, not merely defenses to claims that are filed *by* the FDIC. H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. I, at 335 (1989); see *id.* at 332. The history also makes clear that the overriding purpose of FIRREA was to strengthen the hand of federal regulators, including the FDIC, to respond to the savings and loan crisis. See *id.* at 311; *United States* v. *Winstar Corp.*, 518 U.S. 839, 856-857 (1996) (opinion of Souter, J.); note 7, *infra*.

b. Following FIRREA, courts continued to apply the common law *D'Oench* doctrine in conjunction with Section 1823(e), and to invoke the common law regime to supplement the statutory protections. Thus, for example, courts applied the common law *D'Oench* doctrine to situations in which the FDIC was acting as receiver, *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991) (per curiam) (citing cases); to secret banking agreements that were not confined to interests in specific existing assets, *e.g.*, *Brookside Assocs.* v. *Rifkin*, 49 F.3d 490, 495 (9th Cir. 1995); *Inn at Saratoga Assocs.* v. *FDIC*, 60 F.3d 78, 82 (2d Cir. 1995); *OPS Shopping Ctr., Inc.* v. *FDIC*, 992 F.2d 306, 309-310 (11th Cir. 1993); *Jackson* v. *FDIC*, 981 F.2d 730, 734 (5th Cir. 1992); *North Ark. Med. Ctr.* v. *Barrett*, 962 F.2d 780, 789 (8th Cir. 1992); *Timberland Design*, 932 F.2d at 49-50; *Hall* v. *FDIC*, 920 F.2d 334, 339 (6th Cir. 1990), cert. denied, 501 U.S. 1231 (1991); and to affirmative claims against the FDIC, *e.g.*, *Bowen* v. *FDIC*, 915 F.2d 1013, 1015 (5th Cir. 1990).

c. In 1994, Congress amended Section 1823(e) by adding a subsection ((e)(2)) that altered the application of Section 1823(e) to certain claims of federal, state, and local government depositors. Pub. L. No. 103-325, 108 Stat. 2160. Once again, however, Congress did not disturb the continued application of the common law *D'Oench* doctrine.

4. In 1995, a bill entitled *The D'Oench Duhme Reform Act* (S. 648, 104th Cong., 1st Sess.) was introduced in Con-

gress "to unify the lines of authority developed under the Federal common law" and "Federal statutory law." S. 648, § 2(b)(1). The bill's sponsors expressed concern that in the wake of the savings and loan crisis, *D'Oench* had become too powerful. During hearings, the FDIC explained the evolution of the *D'Oench* doctrine, the FDIC's extensive reliance on that doctrine, and the important federal interests served by *D'Oench* in the "supervision, resolution, and liquidation of banks." *Hearing on S. 648 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104 Cong., 1st. Sess. 15 (1995) [*Hearing on S. 648*] (S. Sivertsen, Assistant General Counsel); see also *id.* at 49-69 (same); *id.* at 70-74 (M. Hileman, Assistant General Counsel, RTC).[4] Not a single sponsor or witness suggested that the common law *D'Oench* doctrine had already been abrogated by Congress; indeed, the continued existence of that doctrine was the impetus for the bill. S. 648 was never reported out of committee.

B. Neither The 1950 Act Nor FIRREA Abrogated The Common Law *D'Oench* Doctrine

Notwithstanding this history, petitioner contends that Congress has extinguished "*any* existing federal common law" (Br. 18 (emphasis added)) under *D'Oench*—if not when it enacted FIRREA, then 39 years earlier when it first enacted Section 1823(e), see Br. 16-17 n.6. Under settled rules of statutory construction, that contention does not withstand scrutiny.

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[4] After discussing the history of the *D'Oench* doctrine, the FDIC's assistant general counsel observed: "In essence, the *D'Oench* doctrine and section 1823(e) serve to ensure that all agreements or arrangements affecting the depository institution's financial condition must be recorded and available for review by regulators and receivers so that they can accurately assess the true financial condition of the institution. This public policy lies at the center of the ability of the FDIC and other regulators to supervise open institutions and to resolve failing ones." *Hearing on S. 648*, at 51 (Sivertsen).

1. As discussed above, the presumption is that Congress legislates with an "expectation" that longstanding common law principles will continue to apply, unless a contrary statutory purpose is evident. *Texas*, 507 U.S. at 534. See also *ibid.* ("In order to abrogate a common-law principle, [a] statute must 'speak directly' to the question addressed by the common law."); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); p. 9, *supra*.

In *Texas*, the Court considered "whether Congress intended the Debt Collection Act of 1982 to abrogate the United States' federal common-law right to collect prejudgment interest on debts owed to it by the States." 507 U.S. at 530. The Court first recognized that the common law doctrine requiring all parties owing debts to the United States to pay prejudgment interest was "longstanding." *Id.* at 533. Next, the Court concluded that Congress had not abrogated that common law by enacting the Debt Collection Act, which imposed new statutory standards for the collection of interest from private parties but was "silent" on the obligation of States. *Id.* at 535. In so holding, the Court recognized that the Debt Collection Act and other statutes had codified and supplemented the common law in certain respects. *Id.* at 535 n.4. But, the Court reasoned, "Congress' obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *Ibid.* To the contrary, the Act's "evident purpose * * * to strengthen the Government's hand in collecting its debts" bolstered the conclusion that Congress did not intend to abrogate the common law rule that served the same purpose. *Id.* at 536-537.

2. As was true of the statute in *Texas*, neither the text, purpose, nor legislative history of the statutory provisions on which petitioner pins *D'Oench*'s fate establishes an intention on the part of Congress to abrogate that longstanding common law doctrine, or speaks directly to the continuing application of that doctrine in situations not addressed by Congress.

a. As we have explained, the 1950 Act codified the application of the *D'Oench* rule on facts parallel to the *D'Oench* case and enhanced that rule by adding stringent recording and approval requirements. See 12 U.S.C. 1823(e) (1952); p. 11, *supra*. While FIRREA left the core of Section 1823(e) unchanged, it made express that that provision applies to the FDIC in its capacity as receiver and to affirmative claims against "the [FDIC as] receiver or the [FDIC in its corporate capacity]." 12 U.S.C. 1821(d)(9)(A). The legislative history of FIRREA states that those amendments were simply intended to "clarif[y]" the reach of Section 1823(e). H.R. Rep. No. 54, *supra*, Pt. I, at 335. That clarification squared with the manner in which the common law *D'Oench* doctrine had been adapted and applied by lower courts since 1950. See pp. 12-13, *supra*.

In arguing that Congress has abrogated the *D'Oench* doctrine, petitioner relies (Br. 29-30) primarily on the fact that Congress has not gone *further* in codifying the common law. But *Texas* establishes that such negative inferences are insufficient to defeat the presumption favoring retention of existing common law. There, as noted above, the Court rejected the State's argument that the common law prejudgment-interest rule had been displaced when Congress "codified and made mandatory the common-law right to collect prejudgment interest at a specified interest rate," explaining that Congress's desire to strengthen the common law in certain respects did not signal an intention to extinguish the common law in other situations. 507 U.S. at 535

n.4. The same conclusion follows just as readily if not more so here.[5]

The State in *Texas* also urged this Court to infer that Congress intended to abrogate common law from the fact that the Debt Collection Act imposed a specific prejudgment-interest requirement on private persons but expressly excluded States from the Act's reach. 507 U.S. at 535. The Court rejected that interpretation, finding that "Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in th[at] area." *Ibid.* So too here. Congress's refusal to legislate with respect to the application of *D'Oench* outside the specific situations addressed by Section 1823(e) fails to establish an intent to abrogate the common law altogether. The "more logical conclusion" is that Congress left the common law doctrine "in place." *Id.* at 538.

City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981), on which petitioner relies (Br. 22, 25), is not to the contrary. In that case, this Court held that a federal common law cause of action had been abrogated by the Federal Water Pollution Control Act Amendments of 1972, reasoning that Congress's obvious intent "to establish an all-encompassing program of water pollution regulation" left "no room for courts to attempt to improve on that program with federal common

[5] *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952), is not to the contrary. That case dealt with the question whether Congress had abrogated the common law rule allowing "a set-off against a seaman's suit for wages." *Id.* at 781. Relying on the extensive "legislation passed by Congress for the protection of seaman," the Court held that Congress "has now covered this field," and that the common law rule with the *contrary* purpose of denying seaman wages had been displaced. *Ibid.*; see *id.* at 784-787. In this case, and in *Texas*, by contrast, there is no statute that conflicts with the common law rule; instead, the statutory provisions at issue are declaratory of certain aspects of the common law and undeniably *promote* the policies underlying the common law rule.

law." *Id.* at 318-319; see *id.* at 319-321 (discussing the "comprehensive" nature of the statutory program). The statutory provisions in this case, which simply codify the common law in certain respects, do not begin to establish the sort of "all-encompassing program" of regulation involved in *Milwaukee*. Cf. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981) (concluding that "comprehensive legislative scheme[]" precluded creation of federal common law rule).[6]

b. As in *Texas*, the "evident purpose" (507 U.S. at 536) of the statutory provisions at issue in this case reinforces the conclusion that Congress has not abrogated the common law *D'Oench* doctrine. FIRREA was enacted to "expand, enhance and clarify" the powers and protections available to the FDIC and other regulators to deal with the savings and loan crisis, H.R. Rep. No. 54, *supra*, Pt. I, at 311—a crisis that threatened to saddle taxpayers with billions of dollars in bailout costs and posed enormous risk to deposit insurance funds and the thrift industry in general.[7] It would have been

[6] Petitioner suggests (Br. 29) that the 1950 Act and FIRREA meet the "'speaks directly' test" because they deal with "the subject covered by the *D'Oench* case." But that is not the correct inquiry. The Debt Collection Act dealt with the same "subject" as the common law—*i.e.*, debt collection—and even addressed the particular issue of prejudgment interest. But this Court rejected the argument that that Act abrogated the common law rule. See *Texas*, 507 U.S. at 534-535; cf. *Smith* v. *United States*, 507 U.S. 197, 204 (1993) ("The applicability of the presumption [against extraterritorial application of United States law] is not defeated here just because the FTCA specifically addresses the issue of extraterritorial application in the foreign-country exception."). As discussed above, the same conclusion follows here.

[7] See also, *e.g.*, H.R. Rep. No. 54, *supra*, Pt. I, at 330 (FIRREA was "designed to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default"); S. Rep. No. 19, 101st Cong., 1st Sess. 3 (1989) (FIRREA constitutes "emergency legislation * * * at a time of crisis in the Federal deposit insurance system and the thrift industry"); H.R. No. 681, 101st Cong., 2d Sess. Pt. I,

surprising, in that crisis environment, for Congress to abrogate, or even trim the edges of, a doctrine that the FDIC regards as "among the most important, long-standing, and powerful protections afforded [it] acting in either its corporate liquidator [or receiver] capacity." 62 Fed. Reg. at 5984. And there is, in fact, no indication whatever that Congress intended to do so.

In *Texas*, this Court reasoned that the fact that the Debt Collection Act was passed to "*strengthen* the Government's hand in collecting debts" indicated that Congress did not intend to abrogate an existing common law doctrine that advanced the same purpose, and thereby *weaken* the government's hand in that area. 507 U.S. at 537 (emphasis added). Likewise, FIRREA was passed to strengthen the government's hand in dealing with failed banks. And, just as was true in *Texas*, that undeniable purpose strongly supports the conclusion that in enacting FIRREA, Congress did not intend to weaken the government's hand by eliminating the substantial protections afforded the FDIC by the common law *D'Oench* doctrine.[8]

c. The complementary evolution of both the common law *D'Oench* doctrine and its statutory protections prior to FIRREA bolsters the conclusion that the further reenactment and expansion of the statutory protections in FIRREA likewise neither abrogated the *D'Oench* doctrine nor halted its continuing development. As the Eleventh Circuit explained:

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at 171 (1990) (FIRREA expands the FDIC's authority to avoid fraudulent transfers and recover fraudulently transferred property).

[8] The evident purpose of the 1950 Act also supports retention of the common law *D'Oench* rule; as discussed above, the legislative history of that Act indicates that it was passed to afford the FDIC "protect[ion] against any arrangements, understandings, or agreements which are not disclosed in the records of the bank." *Hearings on H.R. 5811*, at 209; see note 3, *supra*.

> The statute at issue began in 1950 as a partial codification of the *D'Oench* case. Subsequently, just as the *D'Oench* decision itself was a common law rule fashioned to fill the interstices of federal statutes, courts continued to apply the common law *D'Oench* doctrine beyond the confines of the statutory language in order to fulfill Congress' purposes in enacting §1823(e)(1). Thereafter, in the intervening forty years, the common law *D'Oench* doctrine and the cases under the statute evolved together, each drawing upon the other. * * * Since the creation of § 1823(e)(1) in 1950, innumerable cases in every circuit court of appeals have held that the common law *D'Oench* doctrine and the statute continued to apply and complement each other. Thus, in 1989, when Congress addressed this special area of federal concern as a small part of the overall crisis in the banking industry, Congress was looking at forty years of harmonious coexistence of the common law doctrine and the statute. When Congress merely carried over the substance of the §1823(e)(1) language, we believe that the most reasonable reading of the congressional intent is that Congress codified parts of the evolving *D'Oench* common law, left the state of the law unchanged, and left in place both the statute and the federal common law *D'Oench* doctrine to fill in the inevitable gaps left by the statutory language.

Motorcity of Jacksonville, Ltd. v. *Southeast Bank N.A.*, 83 F.3d 1317, 1333 (11th Cir. 1996) (en banc), vacated and remanded *sub nom. Hess* v. *FDIC*, 519 U.S. 1087 (1997), reinstated, 120 F.3d 1140 (11th Cir. 1997) (en banc), cert. denied, 523 U.S. 1093 (1998).[9]

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[9] Petitioner claims (Br. 23 n.10) that "this Court has never endorsed" the "evolution of the *D'Oench* doctrine in the lower courts." But the relevant question here is whether Congress, not this Court, has displaced that doctrine. Just because "*this* Court" (Pet. Br. 28) has not found it necessary to expound upon or review lower court decisions applying

Congress has had ample opportunity to express disapproval of the common law doctrine that for more than half a century has developed along side and become intertwined with the statutory *D'Oench* protections. Yet Congress did not do so when it enacted Section 1823(e) in 1950; when it reenacted Section 1823(e) in 1982; when it expanded Section 1823(e) and added Section 1821(d)(9)(A) in 1989; or when it amended Section 1823(e) in 1994. In light of that history, Congress must be understood to have intended FIRREA to codify the evolving common law *D'Oench* doctrine in certain respects and, as before, to leave room for the continued evolution of the *D'Oench* doctrine. That understanding is further bolstered by the fate of the proposed *D'Oench, Duhme Reform Act* in 1995, see pp. 14-15, *supra*, which *would* have accomplished essentially the same legislative reform that petitioner now seeks at the hand of this Court.[10]

C. Neither *O'Melveny* Nor *Atherton* Justifies The Conclusion That Congress Has Abrogated The *D'Oench* Doctrine

The bulk of petitioner's argument rests on the premise that the question whether Congress abrogated the *D'Oench* doctrine has already been decided by this Court in

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D'Oench does not mean that the common law doctrine has been frozen in time, or that Congress overlooked the practically legion case law applying *D'Oench* in federal and state courts. In any event, in 1988—on the eve of FIRREA—this Court cited *D'Oench* as an example of valid federal common law. *Boyle*, 487 U.S. at 504.

[10] The FDIC's 1997 policy statement has no bearing on whether Congress abrogated the *D'Oench* doctrine eight years earlier in FIRREA. See note 1, *supra*; cf. Pet. 15 (arguing that the FDIC's policy statement is "legally meaningless"). In any event, the FDIC has consistently maintained that Congress has not abrogated the *D'Oench* doctrine, and its 1997 policy statement is based in part on the FDIC's understanding that Sections 1821(d)(9)(A) and 1823(e) "should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine." 62 Fed. Reg. at 5984.

O'Melveny and *Atherton*. But those cases do not even mention *D'Oench*, and, more to the point, they were addressed to the quite different question whether Congress, in FIRREA, had authorized the "creation" of new federal common law rules to govern areas far removed from the protections or the policies of *D'Oench*. 512 U.S. at 89; accord 519 U.S. at 225-226.

1. *O'Melveny* involved a suit brought by the FDIC in its capacity as receiver against the attorneys for a failed bank. The question presented was whether federal or state law governed the "tort liability of [the] attorneys." 512 U.S. at 81. In concluding that state law controlled, the Court first held that there was no existing federal common law rule on point. *Id.* at 83. Then the Court held that in enacting FIRREA, Congress did not authorize the courts "to promulgate such common law." *Id.* at 86; see *id.* at 87 ("this is not one of those cases in which judicial creation of a special federal rule would be justified"); *id.* at 88 (FIRREA does not authorize "judicial creation of new, 'federal-common-law' causes of action"); *id.* at 89 ("judicial creation of a federal rule of decision is [not] warranted").

Atherton is to the same effect. It involved a suit brought by the Resolution Trust Corporation (RTC) against the officers and directors of a failed bank. The question presented was whether federal or state law established the relevant "standard of care." 519 U.S. at 215. Following *O'Melveny*, the Court held that state law generally supplied the standard of care because there was no existing federal common law rule on point, and there was no basis for "judicial creation of a special federal rule." *Id.* at 218 (quoting *O'Melveny*, 512 U.S. at 87); see *id.* at 219-226. In so holding, the Court recognized that "this Court did once articulate federal common-law corporate governance standards, applicable to federally charted banks," *id.* at 217 (citing *Briggs* v. *Spaulding*, 141 U.S. 132 (1891)), but it concluded that that general federal common law rule "did not survive

this Court's later decision in *Erie* v. *Tompkins*," *id.* at 226. (*D'Oench*, of course, was decided after *Erie* and thus could not have been overridden by *Erie*.)

2. *O'Melveny* and *Atherton* cannot bear the weight that petitioner places on them here. Neither case concerned whether Congress had abrogated an existing or, *a fortiori*, longstanding federal common law rule—the question presented in *Texas* and here. Instead, the cases concerned whether Congress had authorized the "creation" of common law. *O'Melveny*, 512 U.S. at 87, 88, 89; *Atherton*, 519 U.S. at 218. This Court has emphasized that with respect to already-existing federal common law principles, the presumption is that Congress is aware of such principles and "legislate[s] with an expectation that [they] will apply." *Texas*, 507 U.S. at 534 (internal quotation marks omitted). In this regard, we agree with petitioner (Br. 23) that *Texas* does not represent a "departure from" from the analysis applied in *O'Melveny* and *Atherton*. *Texas* applied the "presumption favoring retention of *existing* [common] law," 507 U.S. at 534 (emphasis added), and that presumption simply was not implicated in *O'Melveny* or *Atherton*.

Because the Court's analysis in *O'Melveny* was focused on whether FIRREA authorizes the creation of new federal common law, the Court's "*exclusio alterius*" analysis (512 U.S. at 86) does not govern this case. While such a negative inference may be sufficient in many cases to foreclose the creation of new common law rules, an inference based on silence in a statutory scheme is insufficient to defeat the presumption favoring retention of existing common law. See *Texas*, 507 U.S. at 535 & n.4; pp. 17-18, *supra*. Moreover, while the *O'Melveny* Court concluded that the fact that FIRREA established a "scheme" (512 U.S. at 87) of rights possessed by the FDIC as receiver indicates that Congress did not intend for courts to add rights to that scheme, it by no means follows that in enacting that scheme Congress intended to abrogate the common law doctrine that had for

decades already developed around *one* of those statutory rights.

Petitioner tries (Br. 26) to force this case into the *O'Melveny* and *Atherton* mold by arguing that respondent seeks the creation of common law insofar as he seeks to apply *D'Oench* beyond the precise facts of that 58-year-old case. That argument is without merit. While firmly rooted in this Court's decision in *D'Oench*, the *D'Oench* doctrine has not been frozen in time. In the nearly 60 years since *D'Oench* was decided, courts have applied the common law doctrine to varying situations that do not fit the precise facts of *D'Oench* and that in many respects are the product of events or crises in the banking system that have taken place since *D'Oench*. In those cases, the courts did not create a *new* federal common law rule; they simply applied the existing one (*i.e.*, *D'Oench*) to different facts. That is how common law invariably functions. See *Lutwak* v. *United States*, 344 U.S. at 615, quoted at p. 10, *supra*. As we explain in Point II, *infra*, the court of appeals correctly concluded that the common law *D'Oench* doctrine bars petitioner's reliance on the secret banking agreement in this case. But even if this Court were to disagree on that point, it should reject petitioner's invitation (Br. 18 (emphasis added)) to hold—under the rubric of *O'Melveny* and *Atherton*—that FIRREA "negate[s] *any* existing federal common law."

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COMMON LAW *D'OENCH* DOCTRINE BARS PETITIONER'S CLAIMS

When federal common law exists, it is appropriate for courts to draw upon that law and "apply the traditional common-law technique of decision." *D'Oench*, 315 U.S. at 472 (Jackson, J., concurring). In doing so here, the court of

appeals correctly held that petitioner's claims are barred by the *D'Oench* principle.[11]

1. The only ground that petitioner pressed in the court of appeals for circumventing the common law *D'Oench* doctrine (assuming it survives FIRREA) is that the "doctrine does not apply in cases where the receivership has generated a surplus." Pet. App. A13; see *id.* at A7; Pet. C.A. Br. 2, 11, 23-24; Pet. C.A. Reply Br. 3, 8-9, 13-16. We agree with the Eleventh Circuit that there is no basis for carving out an exception for this unusual circumstance; "the rationale of *D'Oench*, *Duhme*—to protect the FDIC from enforcement of oral agreements against failed institutions—is no less compelling if the failed institution eventually generates a surplus." Pet. App. A14. Cf. *Langley* v. *FDIC*, 484 U.S. at 95 ("The harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts its first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available protective measures."). Moreover, adopting a surplus exception could prolong resolution of claims filed by or against the FDIC involving unrecorded banking agreements, and thereby hamper the receivership, simply due to the remote possibility that a surplus will ultimately emerge.

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[11] When it was the receiver and a party to this case, the FDIC argued that petitioner's claims were barred by Section 1823(e) as well as the common law *D'Oench* rule. Pet. App. B3. Because the court of appeals based its decision on application of the common law rule and the continuing viability of that rule is the basic issue on which this Court granted certiorari (see Pet. i), there is no occasion for this Court to decide whether Section 1823(e) (or Section 1821(d)(9)(A), on which the FDIC did not separately rely in this case) would bar petitioner's claims. We do note, however, that, contrary to the District of Columbia Circuit's view (Pet. App. C7), the FDIC has taken the position that although Section 1821(d)(9)(A) incorporates the formal requirements of Section 1823(e) for recognizing a banking agreement, Section 1821(d)(9)(A) does not condition the protection it affords with respect to claims against the FDIC on a showing of an effect on a specific existing asset. See 62 Fed. Reg. at 5984.

In this Court, petitioner does not rely on this surplus theory to avoid application of *D'Oench*. Instead, he relies primarily on the argument that the common law *D'Oench* doctrine has been entirely abrogated. In support of that argument, petitioner briefly argues that the *D'Oench* doctrine does not apply to the FDIC as receiver, affirmative claims against the FDIC, or successors of the FDIC. See Pet. Br. 26-29. But petitioner did not make those arguments in the court of appeals below as alternative grounds for avoiding the application of the *D'Oench* doctrine, and the court of appeals therefore did not consider or decide those issues. This Court should decline to reach them in the first instance here. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 469-470 (1999) (refusing to reach "alternative theories" not decided below) (citing cases); *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (The Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below.").

2. In any event, the important federal policies underlying the common law *D'Oench* doctrine and its statutory protections are served by holding that petitioner may not rely on the unrecorded banking arrangement in this case in seeking to recover against the FDIC as receiver or its lawful successor.

As numerous courts have held, and as Congress affirmed in FIRREA, the *D'Oench* principle extends to the receivership context. The FDIC relies heavily on bank records in conducting the receivership of a failed bank. For example, to minimize the impact and hardship on uninsured depositors and creditors, the FDIC often pays cash dividends on receiver's certificates issued to depositors and creditors; the FDIC's ability to pay such dividends depends on being able to estimate the receivership's assets and liabilities from existing bank records. See *Hearing on S. 648*, at 52-53 (Sivertsen). In addition, as receiver, the FDIC has a duty to creditors to protect the estate and preserve often scarce

resources. Permitting parties to proceed against the FDIC on the basis of unrecorded agreements with a failed bank would force the FDIC to incur additional legal expenses in defending against such fact-intensive claims, and could result in the payment of unsubstantiated claims to the detriment of the estate in general. Likewise, allowing parties to defend claims brought by the FDIC on the basis of unrecorded agreements would hamper the receiver's ability to collect recorded obligations owed to a bank. That consequence, in turn, could affect the cost to the FDIC, and thus to the taxpayer, of rescuing failed banking institutions.

The federal policies underlying *D'Oench* are also implicated with respect to liabilities arising from normal banking transactions, which the FDIC assumes when it steps into the shoes of a failed bank as receiver and which may be made part of a purchase-and-assumption agreement with another bank. "If the general public policy is to permit regulators and receivers to rely on the institution's records to determine its financial condition, there is no logical justification to differentiate between secret agreements that affect assets and ones that create liabilities because liabilities can also alter the true financial condition of a financial institution." *Hearing on S. 648*, at 50 (Sivertsen). That is particularly true with respect to unrecorded agreements entered into in connection with lending transactions that themselves involve specific bank assets. In this case, for example, petitioner, in arguing that Southeast entered into a joint venture with Orchid, insists that he should be permitted to rely on a secret agreement that conflicts with the express terms of loan documents that bank examiners and creditors must rely upon in assessing the financial condition of a failing or failed bank.[12]

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[12] See also *Motorcity of Jacksonville*, 83 F.3d at 1336 ("The *D'Oench* doctrine bars all claims—even those sounding in tort—that are sufficiently intertwined with regular banking transactions, such that exclusion of the alleged secret agreement accords with the underlying policies of *D'Oench*.") (internal quotation marks omitted); see *id.* at 1334-1336 (discussing application of *D'Oench* with respect to agreements that do not pertain to specific existing assets); *Hall* v. *FDIC*, 920 F.2d 334, 339 (6th Cir. 1990) (same), cert. denied, 501 U.S. 1231 (1991). In addition, parties should not be allowed to circumvent the *D'Oench* rule simply by pleading claims sounding in tort; such a pleading-based exception would eviscerate the important policies underlying *D'Oench*. See *Hearing on S. 648*, at 54 (Sivertsen); *Langley* v. *FDIC*, 484 U.S. at 93 (recognizing that Section 1823(e) and the policies underlying *D'Oench* extend to agreements involving misrepresentations of fact).

Finally, the fact that respondent succeeded the FDIC pursuant to 12 U.S.C. 197 in the fourth year of this litigation should not defeat the application of *D'Oench* either. Section 197 agents assume the rights and responsibilities of the FDIC as receiver. Cf. *Ex parte Chetwood*, 165 U.S. 443, 459 (1897) ("The agent proceeds in the settlement with like authority to that conferred upon the receiver."). Section 197 specifically directs the FDIC to transfer control over the receivership and any remaining matters to the agent. See 12 U.S.C. 197(a). Allowing Section 197 successors to maintain the FDIC's position with respect to the applicability of *D'Oench* not only gives effect to that statutory scheme, but promotes the federal interests in deterring secret banking arrangements. Conversely, there is no sound reason to allow claims based on secret banking agreements that would be unenforceable against the FDIC to spring back to life simply because, due to the course that a particular lawsuit or receivership might take, the FDIC is succeeded by a Section 197 agent before litigation filed against the FDIC-receiver is concluded.[13]

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[13] Courts have recognized that the *D'Oench* protections extend to successors in other contexts. For example, one of the most common and important ways in which the FDIC seeks to minimize losses and protect depositors is through purchase-and-assumption agreements. If the *D'Oench* principle did not extend to the FDIC's successors in that context, then "purchasers would be discouraged from acquiring assets from [the

CONCLUSION

The judgment of court of appeals should be affirmed.

Respectfully submitted.

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FDIC] in the future, and [the FDIC] would find it more difficult to protect the assets of failed institutions." *Porras* v. *Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990); see also *Castleglen, Inc.* v. *RTC*, 984 F.2d 1571, 1577 (10th Cir. 1993) (The *D'Oench* doctrine "would be vitiated if a successor in interest could not enjoy the same protection.").